SUPREME COURT U.S.
FILED

No. 06-

061343 APR 04 2007

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CLAIRE G. COLLIER,

Petitioner,

v.

JO ANNE B. BARNHART,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD F. HANS
Counsel of Record
THACHER PROFFITT & WOOD LLP
Two Financial Center
New York, NY 10281
(212) 912-7400

JOHN VUKELJ
DLA PIPER US LLP
1251 Avenue of the Americas
New York, NY 10020
(212) 335-4500

Counsel for Petitioner

207787

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

A provision of the Social Security Act and its accompanying regulations, known together as the "20/40 Rule," provide that an applicant for Social Security Disability Insurance ("SSDI") above the age of 31 must have worked 20 of the previous 40 quarters (i.e., five of the last ten years) to qualify for SSDI. 42 U.S.C. § 423(c)(1); 20 C.F.R. § 404.130(b). Qualifying for SSDI is a prerequisite for being eligible for Medicare if the applicant is under 65. 42 U.S.C. § 426(b).

1. Does the 20/40 Rule, which renders most women who leave the work force to raise their children ineligible for SSDI, invidiously discriminate against mothers and thereby violate equal protection under the Fifth Amendment?

2. Does the 20/40 Rule's formula for determining eligibility for SSDI violate due process under the Fifth Amendment where the formula is arbitrary and results in most women who leave the work force to raise their children being rendered ineligible for Social Security Disability Insurance?

PARTIES TO THE PROCEEDING

The petitioner is Claire G. Collier, who lives in Stamford, Connecticut with her husband and three children.

The respondent is Jo Anne B. Barnhart, Commissioner of the United States Social Security Administration.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
TABLE OF APPENDICES	ix
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
A. Factual Background	3
B. Procedural History	6
REASONS FOR GRANTING THE PETITION	10
I. THE 20/40 RULE DENIES WOMEN EQUAL PROTECTION UNDER THE FIFTH AMENDMENT.	11
A. The 20/40 Rule Has A Disparate And Disproportionate Impact On Women.	12

Contents

Page

B. The 20/40 Rule Invidiously Discriminates Against Women Because It Is Predicated On Women Of Child-Bearing Age Leaving The Workforce. 15

II. THE 20/40 RULE VIOLATES MRS. COLLIER'S RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT. 21

CONCLUSION 26

TABLE OF CITED AUTHORITIES

Page

CASES

Califano v. Goldfarb, 430 U.S. 199, 97 S. Ct. 1021 (1977) 25

Collier v. Barnhart, 473 F.3d 444 (2d Cir. 2007) 1

De La Cruz v. Tormey, 582 F.2d 45 (9th Cir. 1978) 12, 13

Ellis v. Apfel, 147 F.3d 139 (2d Cir. 1998) ... 11

Harvell v. Chater, 87 F.3d 371 (9th Cir. 1996) 12, 20

Hesse v. Harris, No. 78 C 5176, 1980 U.S. Dist. LEXIS 10122 (N.D. Ill. Jan. 31, 1980) 20

Hurvich v. Califano, 457 F. Supp. 760 (N.D. Cal. 1978) 18, 25

Richardson v. Belcher, 404 U.S. 78, 92 S. Ct. 254 (1971) 11

Tuttle v. Secretary of Health, Education & Welfare, 504 F.2d 61 (10th Cir. 1974) 20

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 17, 18, 25

Winger v. Barnhart, 320 F. Supp. 2d 741 (C.D. Ill. 2004) 20, 21

Cited Authorities

Page

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 423 ..... *passim*

42 U.S.C. § 423(c)(1) ..... i, 2, 12

42 U.S.C. § 426(b) ..... i, 6, 11

REGULATIONS

20 C.F.R. Part 404 ..... i, 23

LEGISLATIVE AND ADMINISTRATIVE MATERIALS

145 CONG. REC. § S5587 (May 19, 1999) 23

The Future of Aging: Hearing before the S. Spec. Comm. on Aging, 109th Cong. (February 3, 2005) (statement of Douglas Holtz-Eakin, Director of Cong. Budget Office) 19

H.R. REP. NO. 76-278 (1939) 18

H.R. REP. NO. 106-1019 (2000) 22

Cited Authorities

Page

Revised Medical Criteria for Evaluating Amyotrophic Lateral Sclerosis, 68 Fed. Reg. 51,689 (Aug. 28, 2003) 23

S. REP. NO. 83-1987 (1954), *reprinted in* 1954 U.S.C.C.A.N. 3710 ..... 17, 25

SOCIAL SECURITY ADMINISTRATION, PUBLICATION NO. 05-10127, ICN 480067, WHAT EVERY WOMAN SHOULD KNOW: SOCIAL SECURITY AND TODAY'S WOMAN (April 2003) 15

Social Security Improvements for Women, Seniors, and Working Americans: Hearing Before the Subcomm. on Social Security of the H. Comm. on Ways & Means, 107th Cong. (February 28, 2002) (testimony of Jo Anne Barnhart, Comm'r of Social Security Admin.) 16

OTHER AUTHORITIES

Matthew H. Hawes, *So No Damn Politician Can Ever Scrap It: The Constitutional Protection of Social Security Benefits*, 65 U. PITT. L. REV. 865, 877 (2004) 18

Samuel Issacharoff & Elyse Rosenblum, *Women & the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2160 (1994) 13

Cited Authorities

Page

Jerry A. Jacobs & Janice Fanning Madden, *Mommies & Daddies on the Fast Track: Success of Parents in Demanding Professions*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 246, 250 (2004) 13

Olivia S. Mitchell & John W. R. Phillips, *Eligibility for Social Security Disability Insurance* (Univ. of Mich. Retirement Research Ctr., Working Paper WP 2001-011, 2001) 14

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Decided January 4, 2007 ..... 1a

Appendix B — Ruling On Plaintiff's Objections To The Magistrate Judge's Recommended Ruling Of The United States District Court For The District Of Connecticut Filed July 24, 2006 ..... 10a

Appendix C — Recommended Ruling Of The United States District Court For The District Of Connecticut Dated And Filed April 25, 2006 ..... 32a

PETITION FOR WRIT OF CERTIORARI

Claire G. Collier respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 473 F.3d 444 and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a. The District Court's opinion is reprinted at Pet. App. 10a and is not otherwise published. The unreported recommended ruling by the Magistrate Judge in the District Court is reprinted at Pet. App. 32a and is not otherwise published.

JURISDICTION

The Court of Appeals entered its judgment on January 4, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Section 223(c)(1) of the Social Security Act (the "20/40 Rule"), 42 U.S.C. § 423 (c) (1), provides, in pertinent part:

> An individual shall be insured for disability insurance benefits in any month if –
>
> > (A) he would have been a fully insured individual (as defined in section 414 of this title) had he attained age 62 and filed application for benefits under section 402(a) of this title on the first day of such month, and
> >
> > (B) (i) he had not less than 20 quarters of coverage during the 40-quarter period which ends with the quarter in which such month occurred, or
> >
> > (ii) if such month ends before the quarter in which he attains (or would attain) age 31, not less than one-half (and not less than 6) of the quarters during the period ending with the quarter in which such month occurred and beginning after he attained the age of 21 were quarters of coverage, or (if the number of quarters in such period is less than 12) not less than 6 of the quarters in the 12-quarter period ending with such quarter were quarters of coverage, or

> (iii) in the case of an individual (not otherwise insured under clause (i)) who, by reason of section *416(i)(3)(B)(ii)* of this title, had a prior period of disability that began during a period before the quarter in which he or she attained age 31, not less than one-half of the quarters beginning after such individual attained age 21 and ending with the quarter in which such month occurs are quarters of coverage, or (if the number of quarters in such period is less than 12) not less than 6 of the quarters in the 12-quarter period ending with such quarter are quarters of coverage . . . .

STATEMENT OF THE CASE

The crux of this case is the suitability of the 20/40 Rule of the Social Security Act for determining women's eligibility for Medicare benefits. Adopted in 1954, the 20/40 Rule relies on a formula the intent and impact of which is to deny SSDI and Medicare benefits to a disproportionate number of women after they have contributed substantial amounts to both funds through tax payments.

A. Factual Background

1. Mrs. Collier is a 44-year-old mother of three children, ages 12, 10, and 9. She and her husband William had their first child, Kieran, in September 1994; their second child, Bridget, in May 1996; and their third child, Leah, in July 1997.

2. Mrs. Collier worked continuously from 1979 through August 1994; she did not stop working until she was eight months pregnant with her first child. At all times during her employment from 1979 through 1994, Mrs. Collier paid Social Security and Medicare taxes, and her various employers paid Social Security and Medicare taxes on her behalf. In total, Mrs. Collier and her employers contributed a total of almost $40,000 in Social Security taxes and almost $10,000 in Medicare taxes on her behalf. From 2000 through 2002, Mrs. Collier performed part time work as a teacher's aide and was an active volunteer at the school her children were attending. She and her employers paid Social Security and Medicare taxes on her behalf in 2000 and 2002.

3. In the spring of 2003, Mrs. Collier started feeling strange physical sensations, including twitching in her arms and cramping in her calves. When the symptoms persisted and gradually worsened, Mrs. Collier visited her doctor who in turn referred her to a series of specialists. One by one, her doctors eliminated the potential ailments. With the list of possibilities shrinking, Mrs. Collier found herself praying for cancer, anything treatable, instead of something worse. By the fall of 2003, Mrs. Collier's worst fear was confirmed; she was diagnosed with amyotrophic lateral sclerosis ("ALS"), commonly known as Lou Gehrig's Disease.

4. ALS is a progressively and rapidly debilitating and devastating neuromuscular disease characterized by a rapid degeneration of the nerve cells of the brain and spinal cord, leading to the wasting of muscles, paralysis and eventual death. Within three years of diagnosis, ALS victims typically lose movement in every

muscle in their body, become unable to speak, and lose the ability to swallow or breathe without complex machinery. Certain augmenting breathing devices may be employed in the short term to assist an individual with ALS. However, the period of effectiveness of such devices is limited. Eventually, an individual with ALS is on a ventilator and feeding tube, requiring round-the-clock medical supervision. Barring a medical breakthrough, artificial life support or divine intervention, most ALS victims will die within five years of the onset of symptoms. Present treatment is aimed at symptomatic relief, prevention of complications, and maintenance of optimal function and quality of life. There is no known cure.

5. ALS treatment imposes a crushing economic burden. As a result of her ALS symptoms, Mrs. Collier has been unable to secure or perform gainful or otherwise substantial employment. To date, Mrs. Collier and her family have incurred and continue to incur substantial, catastrophic costs in her treatment and the maintenance of her condition, having expended more than $500,000 within almost three years. These expenditures include, but are not limited to: (a) a specially designed hospital bed costing $9,712.40; (b) a custom-fitted strap-on vest to help Mrs. Collier breathe and break up and expel mucous through her respiratory system, costing approximately $16,000; (c) home modifications costing over $150,000 to allow for movement of Mrs. Collier in her home; (d) $200,000 in costs to reallocate and modify the Colliers's existing home living space following the home modifications; (e) a unique, customized wheelchair costing $24,877.40; (f) a specially modified van to transport Mrs. Collier

in her customized wheelchair costing $54,184; and (g) special leg braces and splints costing over $500 each. Mrs. Collier's current monthly care expenditures include: (a) between $1,000 and $2,000 per month for various medications; (b) doctor prescribed physical therapy costing over $800 per month; (c) over $800 in costs for in-home massage therapy; and (d) approximately $6,000 a month for around-the-clock home healthcare. Her home healthcare costs have only continued to spiral out of control and it is anticipated that her nursing costs alone this calendar year will exceed $500,000. Furthermore, Mrs. Collier's local municipality has required that all modifications to her home, which are necessary to accommodate her wheelchair and inability to climb stairs, comply with the Americans with Disabilities Act. The added costs of compliance are substantial.

6. Following her diagnosis, doctors told Mrs. Collier that Medicare should offset much of the catastrophic costs. Mrs. Collier later learned, however, that because she was not yet 62, in order to receive Medicare benefits she had to establish qualification to receive Social Security disability benefits. 42 U.S.C. § 426(b).

B. Procedural History

1. Mrs. Collier applied for SSDI in January 2004. On February 1, 2004, the Social Security Administration ("SSA") denied Mrs. Collier's SSDI application on the grounds that she had insufficient recent work credits to qualify. The following month, in March 2004, Mrs. Collier applied for reconsideration of the SSA's initial denial of Social

Security disability benefits. Nearly six months later, in September 2004, the SSA denied her request for reconsideration.

In accordance with the requirement that she exhaust all administrative remedies, Mrs. Collier requested and appeared at a hearing before an Administrative Law Judge on March 14, 2005. In a ruling dated June 10, 2005, the Administrative Law Judge denied Mrs. Collier's claim and held that she "was not under a disability as defined in the Social Security Act, at any time through the date of this decision." (*quoted in part in* Pet. App., at 36a n.6.) The Administrative Law Judge added:

> It is clear that ALS has taken a great toll on [Mrs. Collier's] physical and mental health, and on her family and finances. [Mrs. Collier] has fought courageously against the disease and has done everything possible to continue in her role as a wife and mother. Her personal story is compelling, and her ongoing efforts to raise her children despite the disease merit admiration.

By letter dated June 17, 2005, Mrs. Collier requested permission from the SSA to file an expedited appeal of the Administrative Law Judge's decision. On August 25, 2005, the SSA's Appeals Council denied her request for review, thereby exhausting Mrs. Collier's administrative remedies.

2. On October 28, 2005, Mrs. Collier filed a complaint against the Commissioner in the United States District Court for the District of Connecticut.

Pursuant to a court order, on January 26, 2006, Mrs. Collier moved for summary judgment seeking an order ruling that the 20/40 Rule is unconstitutional. On February 22, 2006, the Commissioner cross-moved for an order affirming the decision of the SSA. On April 25, 2006, Magistrate Judge Joan Glazer Margolis issued a recommended ruling denying Mrs. Collier's motion for summary judgment and affirming the decision of the Commissioner. (Pet. App., at 32a.) On July 17, 2006, the District Court approved and adopted the recommended ruling, offering three bases in support of its ruling. (Pet. App., at 10a.)

First, the District Court confirmed the SSA's determination that Mrs. Collier was not fully insured and, therefore, not eligible for disability benefits under the 20/40 Rule of the Social Security Act, notwithstanding her extensive work history and considerable contributions to the Social Security and Medicare systems.

Second, although it found compelling a number of studies cited by Mrs. Collier that indicate that the 20/40 Rule consistently excludes women from collecting benefits after they have made substantial contributions to the Social Security and Medicare systems, the District Court nonetheless held that the 20/40 Rule of the Social Security Act does not violate Mrs. Collier's Equal Protection rights under the Fifth Amendment. The District Court accepted the Commissioner's assertion that the 20/40 Rule serves the "legitimate goals of creating a self-sufficient social security system and seeks to provide protections for workers in the economy." (Pet. App., at 3a-4a).

Third, the District Court denied Mrs. Collier's Due Process claim, holding that the 20/40 Rule is rationally related to Congress's alleged intent to create a self-supporting Social Security system. The Court rejected Mrs. Collier's arguments that the 20/40 Rule undermines Congress's overarching intent that the Social Security system provide for "the family as a unit" and that the 20/40 Rule conflicts with recent efforts by Congress and the Social Security Administration to provide easier access to Social Security and Medicare benefits to ALS victims.

3. On appeal, the Second Circuit affirmed the District Court's ruling. (Pet. App., at 1a.) Denying the Equal Protection claim, the court found "persuasive" and "compelling" evidence on the record that the 20/40 Rule disparately impacts women's eligibility for SSDI, but it found no evidence that Congress was motivated by an "invidious discriminatory purpose" in enacting the 20/40 Rule. Accordingly, the court held that the 20/40 Rule satisfies the rational review test. Denying the substantive Due Process claim, the court held that the classification created by the 20/40 Rule was not "patently arbitrary." The court also held that there was no evidence of a procedural Due Process violation.

At oral argument, the Second Circuit referred to Mrs. Collier's plight as "a matter of human tragedy" and noted that Mrs. Collier has advocated for legislative reform of the 20/40 Rule. The Court noted that Senator Christopher J. Dodd and Representative Christopher Shays have introduced the "Claire Collier Social Security Disability Insurance Fairness Act," which would make the 20/40 Rule inapplicable "in the case of a disabled individual suffering from a covered terminal illness."

REASONS FOR GRANTING THE PETITION

The constitutionality of the 20/40 Rule is an important question of federal law that has not, and should be, settled by this Court. It impacts untold numbers of unknowing families in which mothers had once worked and contributed to the Social Security system only to be left without government aid precisely in their greatest moment of need. Surely, such a cruel result should not be imposed by the nation's Social Security laws or endorsed by this Court.

There is no valid or legitimate government objective served by denying terminally ill individuals access to Medicare simply because they do not first qualify for SSDI. The courts below have focused on what they have found to be the legitimate objectives of creating barriers to access to SSDI. Yet none have ever articulated a legitimate objective for applying that same barrier to access for the terminally ill to Medicare. The laws already carve out exceptions for certain illnesses, such as blindness and end-stage renal disease, allowing such persons access to Medicare without first qualifying for SSDI. What legitimate government interest is served by permitting access to some, but then restricting access to Medicare for those whose terminal condition is beyond question? As it stands, the law leaves women who have contributed significantly to the Social Security system and who leave the workforce to bear and raise their children without assistance in those harrowing times they most need the societal safety net of Medicare.

Moreover, drawing an arbitrary 20/40 line does not lend legitimacy to the government's claim that the system is designed to be self-supporting. What the law does, however, is single out women who, after paying Social Security and Medicare taxes for years, choose to stop for a time to raise their children. In the case of Mrs. Collier, the 20/40 Rule creates a system in which she would have been eligible for benefits if she had been diagnosed with ALS five years earlier. The law therefore imposes a patently arbitrary and defenseless classification, without rational justification. Such a law violates Mrs. Collier's rights to equal protection and due process under the Fifth Amendment.

I. THE 20/40 RULE DENIES WOMEN EQUAL PROTECTION UNDER THE FIFTH AMENDMENT.

The denial of benefits to Mrs. Collier unconstitutionally discriminates against her and any other women who, after materially contributing to the Social Security and Medicare Trust Funds, elect to stay at home and engage in raising their children.

A statutory classification in the area of social welfare violates Equal Protection if it is not rationally based, and it must "not engage in invidious discrimination." *Ellis v. Apfel*, 147 F.3d 139, 144 (2d Cir. 1998); *Richardson v. Belcher*, 404 U.S. 78, 81, 92 S. Ct. 254 (1971). Under the current rules governing Medicare, a person under the age of 65 diagnosed with ALS is entitled to Medicare benefits only if eligible for and entitled to receive SSDI benefits. 42 U.S.C. § 426 (b). SSDI, in turn, is available to an individual making a disability claim

who has been employed at least 20 out of the 40 quarters preceding the quarter in which the applicant's disability occurs. 42 U.S.C. § 423 (a)(1), (c)(1); *Harvell v. Chater*, 87 F.3d 371, 372 (9th Cir. 1996) (denying challenge to the 20/40 Rule where the plaintiff had not contributed Social Security taxes in 31 years because he was a federal employee and, as such, was entitled to a retirement pension under a separate federal mandate).

A. The 20/40 Rule Has A Disparate And Disproportionate Impact On Women.

A law violates the Equal Protection clause where the discriminatory effects of a "facially neutral" action bear a close relationship to a purported "non-invidious purpose." *See, e.g., De La Cruz v. Tormey*, 582 F.2d 45, 51-53 (9th Cir. 1978) (holding that community colleges' failure to establish childcare facilities violated equal protection rights of women because it resulted in a substantial number of women being denied educational opportunities on an unequal basis). In *De La Cruz*, the Ninth Circuit Court of Appeals held that:

> [a]s with facial discriminations, decisions or actions which, while in form nondiscriminatory, produce effects which weigh adversely and disproportionately upon the members of a particular protected group of individuals, may require explanation in terms of non-invidious purpose.

Id. at 50.

The courts below found compelling various studies and statistics that demonstrate the disparate and disproportional impact of the 20/40 Rule. Studies have shown that "women with professional degrees are out of the labor force at a rate about three times that of their male counterparts and they overwhelmingly cite family responsibilities as the reason."[1] In its effect, therefore, the 20/40 Rule penalizes women between the ages of 31 and 41 who stay at home to care for their children and thus are unable to work at least five of the previous ten years, notwithstanding prior work history. *See, e.g., De La Cruz*, 582 F.2d at 51-53 (holding that community colleges' failure to establish childcare facilities violated equal protection rights of women because it resulted in a substantial number of women being denied educational opportunities on an unequal basis).

For example, an applicant age 31 who worked from age 21 through 26 and paid into Social Security and Medicare for five years would be entitled to SSDI and Medicare benefits under the 20/40 Rule. Conversely, an applicant age 41, such as the Plaintiff here when she was diagnosed with ALS, having

---

[1] Jerry A. Jacobs & Janice Fanning Madden, *Mommies & Daddies on the Fast Track: Success of Parents in Demanding Professions*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 246, 250 (2004). Another study "revealed surprising similarity in the wage profiles of single males and single females, but found that with time and marriage (with childbirth presumably strongly correlated with both the passage of time and marital status), the wage patterns diverged as a result of the discontinuous labor force participation of women." Samuel Issacharoff & Elyse Rosenblum, *Women & the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2160 (1994).

worked and thus contributed to Social Security and Medicare from age 18 through 34 (a period of seventeen years), would not be eligible for SSDI or Medicare. Thus, it is clear that the recency requirements imposed by the 20/40 Rule become more onerous with age, ironically making it more – not less – difficult to receive Medicare or SSDI benefits the closer one is to the respective qualifying ages of 62 or 65.

Several studies further demonstrate the disparate and discriminatory impact of the 20/40 Rule and its recency requirements. Rates of SSDI coverage for women in their 30's and early 40's are nearly 20% lower than that for men of comparable age. Not only are women less likely to be insured, but married women in particular are 10% less likely to be covered than single women. In sum, the current studies have found that "[f]amily structure seems to play an important role in the insured status of women but has little effect for men. It appears that marriage and childbearing, in this cohort of workers at least, make women more susceptible to losing [disability] insurance coverage than men."[2] Accordingly, the recency requirements of the Social Security disability laws represent a substantial barrier to Medicare eligibility for women who take time off from the workforce in order to care for and raise their children. The result is the removal of Medicare's social safety net out from under Mrs. Collier and all women charged by society with the responsibility of bearing, nurturing and caring for our children.

---

[2] Olivia S. Mitchell & John W. R. Phillips, *Eligibility for Social Security Disability Insurance* 11 (Univ. of Mich. Retirement Research Ctr., Working Paper WP 2001-011, 2001), *available at* http://www.mrrc.isr.umich.edu/publications/papers/pdf/wp011.pdf.

B. The 20/40 Rule Invidiously Discriminates Against Women Because It Is Predicated On Women Of Child-Bearing Age Leaving The Workforce.

Despite the 20/40 Rule's undisputed discriminatory effect on women, the courts below held that the purpose behind the 20/40 Rule is not invidious because the purported primary purpose behind the Rule is to maintain a "self-sufficient" Social Security system. The SSA's public representations, however, reveal that the Social Security Act contemplates and relies upon the fact that women between the ages of 31 and 41 years of age will leave the workforce to have and raise children after having contributed Social Security and Medicare taxes. In an April 2003 Electronic Booklet entitled "What Every Woman Should Know: Social Security and Today's Woman," the SSA stated:

> Although some women choose lifetime careers outside the home, many women work for a few years, leave the labor force to raise their children, and then return to work. Some women choose not to work outside their homes. They usually are covered by Social Security through their husbands' work and can receive benefits when he retires, becomes disabled or dies.

See SOCIAL SECURITY ADMINISTRATION, PUBLICATION NO. 05-10127, ICN 480067, WHAT EVERY WOMAN SHOULD KNOW: SOCIAL SECURITY AND TODAY'S WOMAN (April 2003), available at http://www.ssa.gov/pubs/10127.html. Furthermore, on February 28, 2002, Commissioner Barnhart testified on Social Security reform efforts before the Subcommittee on Social Security, Ways and Means Committee and noted that

"women tend to have shorter careers, and, when they do work, earn less than men," and she advocated "incremental changes . . . targeted to address concerns affecting . . . women . . . (which) deal with time limits in the law that are no longer appropriate or that should allow exceptions." *See Social Security Improvements for Women, Seniors, and Working Americans: Hearing Before the Subcomm. on Social Security of the H. Comm. on Ways & Means*, 107th Cong. (February 28, 2002) (testimony of Jo Anne Barnhart, Comm'r of Social Security Admin.) *available at* http://www.ssa.gov/legislation/testimony_022802.html. With respect to these time limits, Commissioner Barnhart recognized that "for the women affected, these changes would make a substantial difference in their economic security." *Id.* Despite the Commissioner's recommendations, the 20/40 Rule in fact fails to recognize the contributions of women who have worked and contributed substantially to the Social Security and Medicare programs prior to becoming homemakers. And by the SSA's own admission, the 20/40 Rule acts to render women dependent on their husbands' Social Security benefits. Accordingly, the Commissioner's and SSA's statements reveal that the 20/40 Rule does not promote a "self-supporting" system at all. Instead, it relies on the tax contributions from women who will be incapable of fulfilling the Rule's recency requirements and, thereby, may never collect under the system. In consideration of its impact and its purpose, the 20/40 Rule should be held unconstitutional for denying Mrs. Collier equal protection in violation of the Fifth Amendment to the United States Constitution.

The courts below rejected Mrs. Collier's claim that the 20/40 Rule, in having a disparate and discriminatory impact on women, undercuts the primary purpose behind the Rule: to protect and provide for the family. Instead, the lower courts opted to perpetuate the myths advanced by the SSA that the Social Security system is "self-supporting" and designed to "'afford protection to working members of the nation's economy.'" Even if the Social Security system were "self-supporting," which it is not, its status as such necessarily depends on the assurance that its female contributors ultimately will leave the work force and be precluded from obtaining benefits.

Furthermore, the alleged goal of "afford[ing] protection to the working members of the nation's economy" is similarly untenable considering that someone like Mrs. Collier, who worked and contributed to the system for fifteen consecutive years before having her children, has been left without Social Security benefits. Indeed, the 20/40 Rule undermines the Social Security system's overarching goal of supporting families in times of need.

The primary goal of the Social Security system is to create "[a] basic program of contributory old-age and survivors insurance (to provide for) the economic security of American families." S. REP. NO. 83-1987, at 1 (1954), *as reprinted in* 1954 U.S.C.C.A.N. 3710, 3710. This Court has recognized and upheld Congress's clear intent, repeatedly holding that the amendments to the Social Security Act of 1939 were designed "'to afford more adequate protection *to the family as a unit*.'" *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643-44 (1975) (quoting H.R.

REP. No. 76-278, at 7 (1939)) (emphasis added); *see also Califano v. Goldfarb*, 430 U.S. 199, 209, 97 S. Ct. 1021 (1977) ("'Social Security is designed . . . for the protection of the family' . . . .") (quoting *Wiesenfeld*, 420 U.S. at 654 (Powell, J., concurring)); *Hurvich v. Califano*, 457 F. Supp. 760, 763 (N.D. Cal. 1978) ("The purpose behind § 402 (g), as revealed by its legislative history, is to provide children who have lost a parent with the personal attention of the other parent by enabling the survivor to stay at home and care for the children."). The 20/40 Rule bears no rational relationship to this goal. In fact, the Rule cuts against the stated objective, since it discourages women from leaving the work force to fulfill the demands of motherhood.

As any contributor to the Social Security system can attest, the notion that the Social Security Act creates a "self-supporting" system strains credulity. It has been noted that "[d]espite being advertised as a self-perpetuating social insurance plan, the Social Security system has been at risk since its inception."[3] Legislators have preferred "to maintain a 'self-supporting' system – *at least in common expectation.*"[4]

Moreover, recent reports expose the fiction of a self-sustaining system. Efforts to reform the Social Security system, as a means of averting an impending

---

[3] Matthew H. Hawes, *So No Damn Politician Can Ever Scrap It: The Constitutional Protection of Social Security Benefits*, 65 U. PITT. L. REV. 865, 877 (2004) ("[T]he founders knew the program would not remain solvent and estimated that government contributions would be necessary as early as 1967 in order to stave off the plan's collapse.")

[4] *Id.* at pp. 877-78 (emphasis added).

collapse, have received the highest attention from the government and the news media. The Director of the Congressional Budget Office ("CBO") recently reported that the Social Security program "cannot be sustained without continual – and substantial – injections of funds from the rest of the budget."[5] The CBO has predicted that "under current law . . . the Social Security trust funds would become exhausted in 2052; after that, the Social Security Administration would lack the authority to pay full benefits and, without Congressional action, outlays would be limited to annual revenues, which would be 22 percent lower than scheduled costs."[6]

The record is wholly deficient of any proof that the SSDI program is practically self-sufficient, nor does it proffer any documentary evidence or statistical analysis that the 20/40 Rule in fact supports a goal of self-sufficiency or that the eradication of the 20/40 Rule would materially undermine that goal. Indeed, the SSA has offered no evidence that the requirement of twenty quarters of coverage furthers the goal of self-sufficiency any more than would 15, 10 or even 5.

---

[5] *The Future of Aging: Hearing before the S. Spec. Comm. on Aging*, 109th Cong. 4 (February 3, 2005) (statement of Douglas Holtz-Eakin, Director of Cong. Budget Office) ("What is not sustainable is continuing to provide the present level of scheduled benefits (those based on the benefit formulas that exist today) given the present financing. Under current formulas, outlays for scheduled benefits are projected to exceed available revenues indefinitely after about 2020.")

[6] *Id.* at p. 7.

Lower courts in various jurisdictions have addressed the constitutionality of the 20/40 Rule, but they are distinguishable because none of them have addressed the Rule's disparate impact on women or, in particular, mothers who have made significant contributions to Social Security before leaving the workforce to bear and raise children. For example, in *Tuttle v. Secretary of Health, Education & Welfare*, the Tenth Circuit Court of Appeals rejected the appellant's claim that the 20/40 Rule created an unconstitutional classification based on earnings. 504 F.2d 61, 63 (10th Cir. 1974). In *Harvell v. Chater*, the Ninth Circuit Court of Appeals rejected the appellant's claim that the 20/40 Rule violated his due process rights because he was fully-insured under the statute but not under the recency requirements of the 20/40 Rule. 87 F.3d 371, 372-73 (9th Cir. 1996) (agreeing with the Tenth Circuit's holding and rationale in *Tuttle*). Similarly, in *Hesse v. Harris*, a nearly 30-year-old decision from the Northern District of Illinois, the plaintiff challenged the constitutionality of the 20/40 Rule after she was denied disability benefits for failing to meet the requirement of "one covered quarter per calendar year." No. 78 C 5176, 1980 U.S. Dist. LEXIS 10122, at *2 (N.D. Ill. Jan. 31, 1980). The court rejected the plaintiff's claim that the 20/40 Rule created an improper classification based on age because individuals over 31 years had to meet the two-fold test of the 20/40 Rule. *Id.* at *1-2.

Winger v. Barnhart is distinguishable as well. There the United States District Court for the Central District of Illinois declined to hold that the constitutional rights of a husband and son of a deceased homemaker were violated by the

Commissioner's denial of survivor's Social Security benefits based on the fact that the decedent had not worked a sufficient amount of time. The decedent cleared the first hurdle under the 20/40 Rule because she had not worked a sufficient number of continuous quarters. 320 F. Supp. 2d 741, 743 (C.D. Ill. 2004). Here, Ms. Collier had worked and been fully insured for years. Significantly, the *Winger* court indicated that the plaintiff's burden of proof in challenging the constitutionality of the 20/40 Rule is not insurmountable. The court stated that the plaintiffs had "fail[ed] to identify any of the goals of the Social Security system, or demonstrate how the quarters of coverage system is incapable of achieving those goals." *Id.* at 746. Here, Mrs. Collier has presented, and the District Court accepted, studies and data demonstrating the 20/40 Rule's failure to achieve the purported goals of self-sufficiency and protecting workers. Moreover, as discussed *supra*, the 20/40 Rule is not rationally related to the overarching purpose of supporting families but instead undercuts that purpose.

In light of the foregoing, the 20/40 Rule should be held unconstitutional for denying Mrs. Collier equal protection in violation of the Fifth Amendment to the United States Constitution.

II. THE 20/40 RULE VIOLATES MRS. COLLIER'S RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT.

Mrs. Collier and her family receive no Social Security or Medicare assistance as a result of the 20/40 Rule, notwithstanding the fact that Mrs. Collier and her employers paid nearly $50,000 in

Social Security and Medicare taxes during the 18 calendar years in which she was employed. This result is unjust and cruel, and it runs contrary to the policies underlying the Social Security and Medicare systems in general and, in particular, as they have been amended to otherwise specifically accommodate victims of ALS.

For example, the ALS Treatment and Assistance Act of 2000 waived Medicare's two-year waiting period for ALS patients so that an individual diagnosed with the disease would be entitled to receive Medicare benefits the very same month that he or she is entitled to receive disability benefits. In amending the Medicare statute, the House of Representatives recognized that "ALS often progresses at a rate that would make Medicare coverage ineffective for this population if individuals were forced to wait 24 months. This provision would *ensure individuals with ALS would be able to access medical treatment through Medicare immediately.*" H.R. REP. NO. 106-1019, at 36 (2000) (emphasis added). The Senate's record of debate similarly reflects that chamber's acute concern for those stricken with ALS:

> Despite the short life expectancy of three to five years, ALS patients must endure a two year waiting period in order to receive Medicare services. Forcing ALS patients to wait until the final months of their illness defies common sense and human decency.
>
> * * *
>
> The immediacy of symptoms in ALS patients and extremely short life

> expectancy illustrate the need to extend the waiver for ALS. In addition, many ALS victims have had productive lives and *will have paid into the Social Security system well before the onset of ALS.*

145 CONG. REC. § S5587 (May 19, 1999) (statement of Sen. Torricelli) (emphasis added).

In 2003, the SSA amended its regulations to revise the criteria in the Listing of Impairments used to evaluate ALS and added ALS to its "list of special impairment categories." The amendments allow the SSA to make findings of *presumptive disability* with respect to claims involving ALS. 20 C.F.R. Part 404. Citing the 2000 amendments to the Medicare waiting period and following Congress's lead, the SSA stated that "[t]hese rules will help people who are disabled with ALS to qualify for Medicare sooner."

We have decided that the simplest and fastest way to process claims of individuals with ALS without sacrificing the quality of our disability determinations and decisions is to revise the listing to provided that anyone who shows that he or she has ALS, established by clinical and laboratory findings, *will be found disabled.*

Revised Medical Criteria for Evaluating Amyotrophic Lateral Sclerosis, 68 Fed. Reg. 51,689 (Aug. 28, 2003) (emphasis added). In issuing its final rules, the SSA waived the Notice of Proposed Rulemaking procedures calling for a 30-day notice and comment period "because use of notice-and-comment rulemaking procedures would be contrary to the public interest. In light of the serious

consequences caused by ALS, ultimately, we find that almost all people who apply for disability benefits based on the condition are disabled." 68 Fed. Reg. 51,692.[7]

The "public interest" to which the SSA referred, and the changes in the rules "reflect[ing] . . . Congress' judgment," were expressed in the earlier modifications to the Medicare waiting period rules:

> The changes we are making in these rules will also help to *implement Congress' judgment* that *individuals who are disabled* under title II of the Act based on ALS should also *receive immediate entitlement to Medicare* rather than having to wait 24 months. It is critical that we issue these rules as soon as possible so that more people can qualify as quickly as possible for Medicare benefits and other services.

68 Fed. Reg. 51,692 (emphasis added). So keen was the recognized public interest that the SSA also "dispens[ed] with the 30-day delay in the effective date of a substantive rule" as otherwise required by law. That is, the rule changes were "effective upon publication." *Id.*

---

[7] The SSA went so far as to boast that in calendar year 2002 it had granted 1,324 of 1,384 SSDI applications by those stricken with ALS on initial review and then had granted 80% of the remaining applications on reconsideration. By computation, this would appear to mean that only 12 of 1,384 applications were denied. It offers no further explanation as to why it denied those applications or whether any of those individuals were similarly situated with Mrs. Collier. *See* 68 Fed. Reg. 51,691.

The instant action reveals that rather than serve the statute's underlying goals, the 20/40 Rule undermines Congress's explicit, overarching intent that Social Security and Medicare provide assistance to families in need, and, in particular, to ALS victims and their families. *See* S. REP. NO. 83-1987, at 1, *as reprinted in* 1954 U.S.C.C.A.N. 3710, 3710 (1954); H.R. REP. NO. 76-278 at 7 (1939); *Goldfarb*, 430 U.S. at 209; *Wiesenfeld*, 420 U.S. at 643; and *Hurvich*, 457 F. Supp. at 764. The SSA's own "Social Security Statement," which is mailed periodically to Mrs. Collier and every other contributor to Social Security, highlights this very point by falsely making promising proclamations, such as:

- "Social Security is for people of all ages . . ."
- "It's here to help you when you need it most."
- "Social Security may help you if you become disabled – even at a young age."
- "It is possible for a young person who has worked and paid Social Security taxes in as few as two years to become eligible for disability benefits."

These statements suggest the reader's entitlement – indeed her property interest – in the benefits of Social Security. They create a false hope for the reader because the 20/40 Rule operates to render these promises meaningless, denying Mrs. Collier due process by removing, without any reasonable or rational basis, any possibility of achieving those

goals. Accordingly, the 20/40 Rule should be held unconstitutional under the Due Process Clause of the Fifth Amendment of the United States Constitution.

CONCLUSION

For the reasons set forth herein, the petition for writ of certiorari should be granted.

Respectfully submitted,

RICHARD F. HANS
Counsel of Record
THACHER PROFFITT & WOOD LLP
Two Financial Center
New York, NY 10281
(212) 912-7400

JOHN VUKELJ
DLA PIPER US LLP
1251 Avenue of the Americas
New York, NY 10020
(212) 335-4500

Counsel for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED JANUARY 4, 2007

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

August Term, 2006

Argued: December 12, 2006
Decided: January 4, 2007

Docket No. 06-3644-cv

CLAIRE G. COLLIER,

Petitioner,

—v.—

JO ANNE B. BARNHART,

Respondent.

Before: FEINBERG, KATZMANN, *Circuit Judges* and PAULEY, *District Judge.**

PER CURIAM:

We are called upon to address a matter of human tragedy. Petitioner Claire Collier has amyotrophic lateral sclerosis (ALS), more commonly known as Lou

* The Honorable William H. Pauley III, of the United States District Court for the Southern District of New York, sitting by designation.

Gehrig's disease. She has suffered greatly from this disease and, in addition to the physical pain, the financial cost has been staggering. However, we are compelled to conclude that the statute which guides this Court's review denies Collier Social Security Disability Insurance (S SDI) and Medicare benefits because she does not have the required recent work history. Moreover, because petitioner cannot make out a constitutional challenge to the recent work history requirement, we must **AFFIRM** the district court's adoption of the Magistrate Judge's recommendation to deny petitioner's motion for summary judgment and grant respondent's motion to affirm the denial of Social Security Disability Insurance benefits to petitioner. We recognize the difficulty petitioner has faced because of the eligibility rules and, recognizing that we have no license to alter the legislative scheme, note that a legislative solution to petitioner's concern may be appropriate.

I.

In the fall of 2003, Collier was diagnosed with ALS. Since then Collier and her family have expended more than $500,000 on special equipment and medical care. To alleviate some of this financial burden, in January 2004, petitioner applied for Social Security Disability Insurance (SSDI), as that is the prerequisite for Medicare eligibility for those under 65. 42 U.S.C. § 426(b).

The Social Security Administration denied Collier's application on February 1, 2004, as she had insufficient recent work history to qualify for benefits.

Specifically, the statute requires that an applicant above the age of 31 must have worked twenty of the previous forty quarters (i.e., five of the last ten years) to qualify for SSDI ("the 20/40 Rule"). 42 U.S.C. § 423(c)(1); 20 C.F.R. § 404.130(b). It is undisputed that Collier did not have a recent work history as she left the paid workforce in 1994, upon the birth of her first child. Collier continued to be a stay-at-home mother through the birth of her second and third children; she states that "she always intended to return to the workforce," but wanted "to be a full-time mother while her children were young." For fifteen consecutive years beforehand, however, from 1979 through 1994, petitioner had worked outside the home and, during that time, she and her employers contributed over $40,000 in Social Security and Medicare taxes.

After the initial denial, petitioner sought additional review within the Social Security Administration and her application was denied. She then filed suit in the District of Connecticut. In her October 28, 2005 complaint she argued that her rights to due process and equal protection were violated as the 20/40 rule discriminated against women, who are more likely to leave the workforce to parent full-time. Collier moved for summary judgment on January 26, 2006, and, on February 22, 2006, the government cross-moved for an affirmance of the agency's order. Magistrate Judge Joan Glazer Margolis, on April 25, 2006, issued a Report & Recommendation, recommending denial of Collier's motion and affirmance of the underlying decision. The District Court adopted this ruling on July 17, 2006, finding that the 20/40 Rule survives rational basis review because it serves the legitimate goals of

ensuring that the Social Security system is self-sufficient and limiting disability benefits to those dependent on employment income.

II.

We review the constitutionality of a federal statutory provision *de novo*. *See Muller v. Costello*, 187 F.3d 298, 307 (2d Cir.1999).

For those under 65, Medicare eligibility is set out in 42 U.S.C. § 426(b). Section 426 provides that: "every individual who ... is entitled to, and has for 24 calendar months been entitled to, ... disability insurance benefits under section 423 of this title ... shall be entitled to hospital insurance benefits." Section 423 provides that an individual 31 or older "shall be insured for disability insurance benefits in any month if ... he had not less than 20 quarters of coverage during the 40-quarter period which ends with the quarter in which such month occurred." *Id.* § 423(c)(1). Similarly, the regulations provide that if an applicant is 31 or older, not blind, and has not suffered a period of disability before age 31, that applicant "must meet the 20/40 requirement." 20 C.F.R. § 404.130. It is undisputed that Collier did not meet this statutory requirement.

The law is clear as to Collier's burden in claiming an Equal Protection Clause violation:

> When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionally adverse, a twofold inquiry is ... appropriate. The first

> question is whether the statutory classification is ... indeed neutral in the sense that it is not gender-based. If the classification itself, covert [or]overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. In this second inquiry, impact provides an important starting point, but purposeful discrimination is the condition that offends the Constitution.

Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 274, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (internal citations and quotation marks omitted); *see also Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118 (2d Cir.2004) ("To make out . . . a claim [for gender discrimination under the Equal Protection Clause], the plaintiff must prove that she suffered purposeful or intentional discrimination on the basis of gender."). While Collier's equal protection claim is brought under the Fifth Amendment, the "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217-18, 235, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).

Petitioner argues that the 20/40 Rule has a disproportionate impact on women. There is persuasive evidence in the record that "women with professional degrees are out of the labor force at a rate about three times that of their male counterparts

and they overwhelmingly cite family responsibilities as the reason," Jerry A. Jacobs and Janice Fanning Madden, *Mommies & Daddies on the Fast Track: Success of Parents in Demanding Professions*, 596 Annals Am. Acad. Pol. & Soc. Sci. 246, 250 (2004), and that "marriage and childbearing . . . make women more susceptible to losing [disability] insurance coverage than men," Olivia S. Mitchell & John W.R. Phillips, Univ. Mich. Ret. Research Ctr., Eligibility for Social Security Disability Insurance (2001). The district court characterized this evidence as "compelling," *Collier v. Barnhart*, 05 Civ. 01677(PCD), slip op. at 9 n. 6 (D.Conn. July 24, 2006), and we agree. However, as the district court correctly observed, Supreme Court precedents dictate that disparate impact is only a "starting point," *Feeney*, 442 U.S. at 274, 99 S.Ct. 2282 (internal quotation marks omitted), and petitioner must prove discriminatory purpose. *See Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) (holding that disparate impact is insufficient for an Equal Protection Clause violation claim); *see also Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause[ ] . . . [but] *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. . . . [Courts must determine] whether invidious discriminatory purpose was a motivating factor. . . .").

It is here that petitioner's argument fails, as she has no evidence that Congress was motivated by an "invidious discriminatory purpose" in enacting the 20/

40 Rule. At best, her evidence indicates a recognition that women may suffer because of the 20/40 Rule. However, we have held that "[t]he legislative recognition of adverse impact does not suffice to imply such a purpose; the requirement of purposeful discrimination means that equal protection is not violated unless the [challenged provision] was enacted not 'in spite of' its adverse effect on the [identifiable group] but rather because it would have that effect." *Johnson v. Wing*, 178 F.3d 611, 615 (2d Cir.1999); *see also Feeney*, 442 U.S. at 279, 99 S.Ct. 2282.

Because petitioner has not demonstrated invidious sex discrimination, we analyze the 20/40 Rule under rational basis review. *Zalewska v. County of Sullivan, New York* 316 F.3d 314, 323 (2d Cir.2003). As set forth by the Supreme Court, rational basis review is satisfied where "there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger v. Hahn*, 505 U.S. 1, 11-12, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) (internal citations omitted); *see also Tanov v. INS*, 443 F.3d 195, 201 (2d Cir.2006). Legislation need only meet a minimal threshold in order to satisfy the rational review test. Here, Congress indicated in legislative history that "it is reasonable and desirable that there be reliable means of limiting . . . protection to those persons who have had sufficiently long and sufficiently recent covered employment to indicate that they probably have been dependent upon their earnings." S.Rep. No. 05-2388,

(1958), *reprinted in* 1958 U.S.C.C.A.N. 4218, 4229. We cannot conclude that the 20/40 Rule does not meet the minimal standard of rationality, as Congress could rationally choose to distribute a scarce resource among those who both have contributed more recently to the system and have indicated, by their actions, that they are more dependent on the salaries they draw from being employed. As a Court, we observe that we have no authority to override Congress's policy preference so as to substitute our own views, whatever they might be, for those of Congress.

Petitioner's due process claim fails for similar reasons.

> Congress has wide latitude to create classifications that allocate noncontractual benefits under a social welfare program. . . . Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as (Social Security), we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.

Califano v. Goldfarb, 430 U.S. 199, 210, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977) (internal citations and quotation marks omitted, alteration in original). As discussed earlier, this classification is not "patently arbitrary." To the extent petitioner alleges a procedural due process violation, that too fails because Collier does not allege that she was deprived

of procedural protections, nor can she claim that she is entitled to more than the statute explicitly provides.

III.

Because there is no evidence of invidious sex discrimination, and because the 20/40 Rule satisfies rational basis scrutiny, we **AFFIRM** the District Court's decision. We note, however, that Collier has also advocated for legislative reform of the 20/40 Rule. Both Senator Christopher J. Dodd and Representative Christopher Shays have introduced the "Claire Collier Social Security Disability Insurance Fairness Act," which would make the 20/40 rule inapplicable "in the case of a disabled individual suffering from a covered terminal disease." S. 3839, 109th Cong. (2006); H.R. 6304, 109th Cong. (2006). These proposals recognize that Congress, not the courts, is the appropriate forum for any change to the 20/40 Rule. While we as a Court are without authority to provide the relief that petitioner seeks, Congress can do so. Petitioner must turn to the legislative branch to consider this issue of great human consequence.

APPENDIX B — RULING ON PLAINTIFF'S OBJECTIONS TO THE MAGISTRATE JUDGE'S RECOMMENDED RULING OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT FILED JULY 24, 2006

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 3:05cv1677 (PCD) (JGM)

CLAIRE COLLIER,

Plaintiff,

-vs-

JO ANNE B BARNHART, COMMISSIONER OF SOCIAL SECURITY,

Defendant.

RULING ON PLAINTIFF'S OBJECTIONS TO THE MAGISTRATE JUDGE'S RECOMMENDED RULING

This action, filed under § 205(g) of the Social Security Act, 42 U.S.C. § 405(g), as amended, seeks judicial review of a final decision by the Commissioner of Social Security (the "Commissioner"), in which she found that Plaintiff was not entitled to Disability Insurance Benefits ("DIB"). Currently pending are Plaintiff's Motion for Summary Judgment [Doc. No. 10] and Defendant's Motion for Order Affirming the Decision of the Commissioner [Doc. No. 15]. On April

25, 2006, Magistrate Judge Joan Glazer Margolis issued a Recommended Ruling [Doc. No. 22] denying Plaintiff's Motion for Summary Judgment and granting Defendant's Motion for Order Affirming the Decision of the Commissioner ("Recommended Ruling"). Plaintiff filed her Objections to the Recommended Ruling [Doc. No. 23] on May 8, 2006.[1]

For the reasons that follow, the Recommended Ruling is **approved** and **adopted**.

I FACTUAL AND ADMINISTRATIVE BACKGROUND[2]

Plaintiff is a forty-three year-old female who is married with three children and who worked consecutively for fifteen years, from 1979 to August 1994. (*See* Certified Transcript of Administrative Proceedings, filed December 23, 2005 ("Tr."), 24-25, 49-50, 53, 142.) Over the course of her fifteen years of employment, Plaintiff paid $19,544.00 to Social Security and $4,668.00 to Medicare; her employer matched both amounts. (*See* Tr. 53.) Plaintiff stopped working in 1994 when she was eight months pregnant with her first child, and thereafter became a stay-at-home mother. (*See* Tr. 40, 41, 142, 152-53, 169-72.) On October 13, 2003, after complaining about twitches

---

1. Defendant did not file any objections to the Recommended Ruling or any response to Plaintiff's objections.

2. Familiarity with Magistrate Judge Margolis's comprehensive ruling detailing the facts and circumstances underlying this dispute is presumed.

in her arm and cramps in her calves and the arches of her feet, Plaintiff was diagnosed with Amyotrophic Lateral Sclerosis ("ALS") by Dr. Dale J. Lange. (*See* Tr. 126, 179.)

Plaintiff filed her application for DIB on January 27, 2004. (*See* Tr. 24-26.) The ALJ found that "ALS has taken a great toll on [Plaintiff's] physical and mental heath, and on her family and finances," and that she "has fought courageously against the disease," however, Plaintiff was denied disability benefits on the ground that her work history was insufficient. (*See* Tr. 19-22, 27-29.) Specifically, the ALJ found that because Plaintiff was not severely impaired prior to December 31, 1999, her last date insured, she was not under a "disability" as defined in the Social Security Act, 20 C.F.R. § 404.1520(c). (*See* Tr. 21-22) Plaintiff conceded that she was insured for disability purposes only through December 1999 and that she had no symptoms of ALS until 2003, and accordingly, was challenging the provisions of the Social Security Act and regulations, specifically, 42 U.S.C. § 423(c)(1), on constitutional grounds. The ALJ, however, observed in his decision that he lacked "the authority to disregard the requirements of the Social Security Act and regulations" so as to decide in Plaintiff's favor. (*See* Tr. 20.)

This Court referred the parties cross-motions for summary judgment to Magistrate Judge Joan Glazer Margolis. In her Recommended Ruling, Magistrate Judge Margolis recommended that this Court deny Plaintiff's Motion for Summary Judgment and grant Defendant's Motion for an Order Affirming the

Decision of the Commissioner. Like the Commissioner, Magistrate Judge Margolis found that Plaintiff was not fully insured, and thus was not eligible for disability benefits under the Social Security Act. In addressing Plaintiff's constitutional claims, Magistrate Judge Margolis held that the 20/40 rule is not "patently arbitrary or lacking rational justification" and is "rationally related to the legislative purpose underlying the Social Security System," and as such, does not deny Plaintiff equal protection under the Fifth Amendment and does not violate the due process clause of the Fifth Amendment. (Recomm. Ruling 16, 19.)

II. DISCUSSION

A. Standard of Review of a Magistrate Judge's Recommended Ruling

In the face of an objection to a Magistrate Judge's recommended ruling, the District Court makes a de novo determination of those portions of the recommended ruling to which an objection is made. *Smith v. Barnhart*, 406 F. Supp. 2d 209, 212 (D. Conn. 2005). This Court may accept, reject, or modify the recommended ruling, receive further evidence, or recommit the matter to the Magistrate Judge with instructions. *See* 28 U.S.C § 636(b)(1); Fed. R. Civ. P. 72(b).

B. Standard of Review of a Social Security Disability Determination

A court reviewing the decision of an ALJ will set aside the decision only if it finds that the ALJ failed

to properly apply correct legal principles in making a determination or if the decision is unsupported by "substantial evidence." *See Balsamo v. Chater*, 142 F.3d 75, 79 (2d Cir. 1998). Substantial evidence is "more than a mere scintilla;" it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971) (internal quotation and citation omitted); *Yancey v. Apfel*, 145 F.3d 106, 111 (2d Cir. 1998) Thus, this Court must accept the decision of the ALJ unless it is based on legal error or not supported by substantial evidence. *Rosa v. Callahan*, 168 F.3d 72, 77 (2d Cir. 1999). This "substantial evidence" standard also applies to inferences and conclusions drawn from findings of fact. *See Gonzales v. Apfel*, 23 F. Supp. 2d 179, 189 (D. Conn. 1998); *Rodriguez v. Califano*, 431 F. Supp. 421, 423 (S. D.N.Y. 1977). The district court may not decide facts, reweigh evidence, or substitute its judgment for that of the Commissioner. *See Dotson v. Shalala*, 1 F. 3d 571, 577 (7th Cir. 1993). In reviewing the ALJ's decision, the court must consider the entire administrative record, including new evidence submitted to the Appeals Council following the ALJ's decision. *See Perez v. Chalet*, 77 F.3d 41, 46 (2d Cir. 1996). Furthermore, "[w]here there is a reasonable basis fox doubt whether the ALJ applied correct legal principles, application of the substantial evidence standard to uphold a finding of' no disability creates an unacceptable risk that a claimant will be deprived of the right to have her disability determination made according to the correct legal principles" *Schaal v. Apfel*, 134 F.3d 496, 504 (2d Cir. 1998).

C. Discussion of Recommended Ruling and Objections Thereto

Under the Social Security Act, every individual who suffers from a "disability" is entitled to receive disability insurance benefits *See* 42 U.S.C. § 423(d)(1)(A).[3] the Act defines "disability" as an

---

3. In reviewing disability claims, the SSA follows a five-step procedure *See* 20 C.F.R. §§ 404.1520, 416.920. First, the Commissioner must determine whether the claimant is currently engaged in any "substantial gainful activity." If the claimant is not so engaged, the Commissioner next considers whether the claimant has a "severe impairment" which is of the required duration and which significantly limits his or her ability to work. If the claimant is engaged in substantial gainful activity and/or does not exhibit a sufficiently severe impairment, the claim will be disallowed *See* 20 C.F.R. § 404 1520(a)-(c) Where both conditions are met, however, the Commissioner then compares the medical evidence of the claimant's impairment to a list of impairments presumed severe enough to preclude any gainful work If the claimant's impairment matches or "equals" one of the listed impairments, he or she is considered "disabled" and qualifies for benefits without further inquiry See 20 C.F.R. § 404 1520(d) If, however, the claimant does not qualify under the listings, the Commissioner must then determine whether the claimant can perform his or her own past work. *See* 20 C.F.R. § 404 1520(e)-(f) If it is found that the claimant cannot do so, then the Commissioner will assess the claimant's present job qualifications and determine whether there are other jobs that the claimant could perform. *See* 20 C.F.R. § 404 1520(g); *see also generally Heckler v. Campbell*, 461 U.S. 458, 460-61, 103 S. Ct. 1952, 76 L. Ed. 2d 66 (1983). The claimant bears the initial burden of proving that he or she is disabled, however, if the claimant can establish the existence of an impairment that renders

(Cont'd)

"inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). In 2003, the Social Security Administration ("SSA") amended its regulations to allow the SSA to make findings of presumptive disability in Listing 11.10 with respect to claims involving ALS. *See* Revised Medical Criteria for Evaluating Amyotrophic Lateral Sclerosis, 68 Fed. Reg. 51689, 51691-92 (Aug. 28, 2003) (to be codified 20 C.F.R. pts. 404 and 416). Thus, a claimant diagnosed with ALS is presumptively disabled. It is undisputed in this case that Plaintiff suffers from ALS, a medically determinable impairment. (*See* Tr. 22.)

In order to qualify for disability benefits, a claimant must, in addition to proving that she is "disabled" under the statute, show that she has "insured status," *See* 20 C.F.R. § 404.130.[4] For Plaintiff to show that she has insured status for the purpose of obtaining disability benefits, she must satisfy Rule I, or the "20/40 rule," 20 C.F.R. § 404.130(b). Under the 20/40 rule, Plaintiff is required to show that she had at least twenty quarters of coverage in the forty quarter period ending with

(Cont'd)
him or her unable to perform his or her own past work, the burden then shifts to the Commissioner to show that there is another job in the national economy which the claimant could perform *See Balsamo*, 142 F.3d at 80.

4. There are four rules outlined in 20 C.F.R. § 401.130, however, only Rule I is applicable to this case.

the quarter in which she eventually become disabled. *See* 20 C.F.R. § 404.130(b)(2).[5] It is undisputed that Plaintiff did not have "insured status" on October 13, 2004, when she was diagnosed with ALS,. She was only insured for benefits through December 31, 1999, the end of the last of forty quarters during which Plaintiff was covered for twenty quarters. (*See* Tr. 19-22.) To interpret the regulation as applying to persons who are not holly insured at the beginning of a period of disability would conflict with the underlying statute. *See* 2 SOCIAL. SECURITY LAW AND PRACTICE § 13.35, at 34, As such, the inquiry in this case is confined to the constitutionality of 42 U.S.C. § 423(c)(1), which, as applied, results in the denial of disability benefits to Plaintiff.

1. *Fifth Amendment Equal Protection Claim*

Plaintiff' contends that the 20/40 rule denies Plaintiff equal protection under the Fifth Amendment because the rule has a "disparate and discriminatory impact" upon Plaintiff and other women who, "after materially contributing to the Social Security and Medicare Trust Funds, elect to stay home and engage in the mothering of their children." (Pl's Mem. Supp. Mot. Summ. J. 7-9; Pl.'s Mem. Opp. Def.'s Mot. Affirm 2-3) In response,

5. A "quarter" of coverage, as used in the regulations, "is the basic unit of social security coverage used in determining a worker's insured status." 20 C.F.R. § 404. 140(a) An individual earns "quarters" based on the wages he or she was paid during the period of three calendar months ending on March 31, June 30, September 30, or December 31 of any year. *See* 42 U.S.C. § 413(a)(1); 20 C.F.R. § 404.101(b).

Appendix B

Defendant argues that Plaintiff has failed to show an equal protection violation because the governmental purposes underlying the 20/40 rule are legitimate ones and the statute beats a rational relationship to those purposes. (Def.'s Mem. Supp Mot. Affirm 4-5.)

Although the Fifth Amendment does not contain an equal protection clause, "it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider v. Rusk*, 377 U.S. 163, 168, 84 S. Ct. 1187, 1190, 12 L. Ed. 2d 218, 222 (1964) (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 98 L. Ed. 884 (1954)). The standards for analyzing equal protection claims under the Fifth Amendment and the Fourteenth Amendment are identical. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2, 95 S. Ct. 1225, 43 L. Ed. 2d 514 (1975).

The equal protection guarantee does not forbid all classifications; a statute that does not "burden a fundamental right or draw distinctions based on a suspect classification" will be upheld if it bears a rational relationship to a "legitimate governmental objective." *Nicholas v. Tucker*, 114 F.3d 17, 20 (2d Cir. 1997); *see also Dandridge v. Williams*, 397 U.S. 471, 485-86, 90 S. Ct. 1153, 25 L. Ed. 2d 491, *reh'g denied*, 398 U.S. 914, 26 L. Ed. 2d 80, 90 S. Ct. 1684 (1970) (holding that a classification with some "reasonable basis does not offend the Constitution simply because [it] is not made with mathematical nicety or because in practice it results in some inequality") (internal quotations & citation omitted). Both the Supreme Court and the Second Circuit have held that rational basis review applies to challenges to distinctions made in the context of social welfare

statutes, as is at issue in this case. *Brown v. Bowen*, 905 F.2d 632, 635 (2d Cir.), *cert. denied*, 498 U.S. 1093 (1991); *see also Dandridge*, 397 U S. at 487 (noting that "the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients"). It is well-settled that Congress has wide latitude to create classifications that allocate non-contractual benefits under a social welfare program. *Weinberger v. Salfi*, 422 U.S. 749, 776-777 (1975); *Flemming v. Nestor*, 363 U.S. 603, 609-610 (1960). In *Flemming*, 363 U.S. at 611, the Supreme Court said:

> Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Securityj, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.

In such a case, the legislature's choices will be upheld unless they are "clearly wrong, a display of arbitrary power, not an exercise of judgment." *Bowen v. Owens*, 476 U.S. 340, 345, 106 S. Ct, 1881, 1885, 90 L. Ed. 2d 316 (1986); *see also Mathews v. De Castro*, 429 US. 181, 185, 97 S. Ct. 431, 434, 50 L. Ed. 2d 389 (1976) ("the challenged statute is entitled to a strong presumption of constitutionality"). In sum, if social welfare statutes have a rational basis and do not engage in invidious discrimination, they do not violate the equal protection clause, regardless of whether flaws may be found in their logic. *Brown*, 905

F.2d at 635; *see also Dandridge*, 397 U.S. at 486 (noting that "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific," and holding that federal courts have no power to impose "their views of what constitutes wise economic or social policy").

There are two ways in which governmental action can violate the equal protection clause. First, the courts can strike down a statute when Congress "explicitly classifies or distinguishes among persons" based on specific criteria, such as race, gender, religion, or ethnicity *De La Cruz v. Tormey*, 582 F.2d 45, 49-50 (9th Cir. 1978). Even where there is no "facial discrimination," as in this case, there may still exist a second and "more subtle" form of discrimination, which focuses on the effects rather than the form of governmental action *Id.* at 50. This type of discrimination involves decisions or actions which, although facially nondiscriminatory, "produce effects which weigh adversely and disproportionately upon the members of a particular protected group of individuals, [and] may require explanation in terms of non-invidious purposes." *Id.*

In her Recommended Ruling, Magistrate Judge Margolis cited and did not dispute the studies cited by Plaintiff showing that (1) women are more likely than men to leave the workforce to care for their children and raise their families, and (2) as a result, women are substantially less likely than men to qualify for Social Security Disability Insurance

("SSDI") benefits (*See* Recomm. Ruling 11-12,13.)[6] Magistrate Judge Margolis declined, however, to find that this evidence gave rise to an inference of intentional discrimination (*Id.* 12-13.)

---

6. Plaintiff produced, and Magistrate Judge Margolis discussed, a number of compelling studies (*See generally* Pl's Mem. Supp. Mot. Summ. J. 7-9; Pl's Mem. Opp. Def's. Mot. Affirm. 2-4; Recomm. Ruling 12-13) Specifically, Plaintiff cited studies going to show that "women with professional degrees are out of the labor force at a rate about three times that of their male counterparts and they overwhelmingly cite family responsibilities as the reason. Jerry A. Jacobs & Janice Fanning Madden, *Mommies & Daddies on the Fast Track: Success of Parents in Demanding Professions*, 596 ANNALS OF AM. ACAD. OF POL. & SOC. SCI 246, 250 (2004); *see also* Samuel Issacharoff & Elyse Rosenblum, *Women & the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2160-65 (1994). Specifically, Issacharoff and Rosenblum found that "[h]aving children makes it more likely that women will leave the workforce altogether or switch to part-time employment." Issacharoff & Rosenblum, at 2165. Moreover, the evidence shows that (1) the rates of Disability Insurance coverage for women in their early thirties and early forties are nearly twenty percent lower than those for men of comparable ages; (2) married women are ten percent less likely to be insured than single women; and (3) the SSA's records reveal that women between the ages of thirty-one and forty-one are more likely to be rejected by the SSA than any other group or age bracket. Olivia S. Mitchell & John W.R. Phillips, *Eligibility for Social Security Disability Insurance*, ISSUES IN BRIEF—U. MICH. RETIREMENT RESEARCH CTR. (2001). As a result, "working women are less well-protected by Social Security disability insurance than are working men due to their more episodic labor market attachment " *See* Mitchell & Phillips, at 4.

Appendix B

Plaintiff, in her Objections to the Recommended Ruling, argues that because the evidence and findings in Plaintiff's studies are undisputed, the Court should find that "the law itself necessarily and invidiously discriminate[s] against women and in particular women who left the workforce." (Pl's Objs. to Recomm. Ruling 2-3) Plaintiff cites data produced by the SSA in response to a Freedom of Information Act request, which reveals that women between the ages of thirty-one and forty-one are more likely to be rejected by the SSA than are women or men in general. (*See* Pl.'s Objs. to Recomm. Ruling 4 (*citing* Exh. A to Hans Aff.)) Specifically, the data shows that upon initial application, 4.99 percent of all men and 4.86 percent of all women with either ALS or Anterior Horn Cell disease are denied at the initial application stage, whereas 7.85 percent of women between the ages of thirty-one and forty-one are denied benefits. (*Id.*)[7] At the reconsideration stage, only 25.1 percent of all men and 25.6 percent of all women are again denied benefits, however, 57.1 percent of women between the ages of thirty-one and forty-one are again denied benefits. (*Id.*)[8]

---

7. The table provides data for 1994 through 2005, and although women between the ages of thirty-one and forty-one are shown to have been denied benefits at a higher rate than men or women as a whole, these women also applied for and were denied benefits in significantly lower numbers. Notably, zero women between the ages of thirty-one and forty-one were denied benefits in 1999, 2003, and 2005. (Exh. A to Hans Aff.)

8. Again, because of the very small sample size, it is unlikely that the difference would be found to be significant.

Appendix B

Although Plaintiff's studies, and particularly her own plight, are compelling, the Supreme Court has made it clear that facially neutral official action does not violate the Equal Protection Clause simply because it has a disproportionate impact on a specific group.[9] *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977); *see also De La Cruz*, 582 F.2d at 58, Plaintiff must also plead and prove intentional discrimination. Plaintiff must prove only that a discriminatory purpose was one motivating factor in the decision; she need not show that the challenged statute rested solely on a discriminatory purpose. *Arlington Heights*, 429 US. at 265-66. A determination of whether intentional discrimination was a factor in challenged governmental action requires a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available" and necessitates the production of other evidence, such as "the existence of a 'clear pattern' unexplainable on grounds other than discrimination, the historical background of a decision, the 'specific sequence of events' leading up to the challenged action, and 'departures' from the normal procedural sequences and substantive policies." *Id.* at 58-59 (quoting *Arlington Heights*, 429 U. S. at 266-68).

---

9. The effects of the challenged rule do not fall exclusively upon women, but also impact men with child-rearing responsibilities. This fact, however, is not a bar to a finding of discriminatory impact so long as Plaintiff can show "imbalance and disproportionality." *See De La Cruz*, 582 F.2d at 57.

Appendix B

This Court, like the Magistrate Judge, finds that Plaintiff has failed to prove intentional discrimination. Specifically, she has failed to cite any evidence going to show that Congress, in enacting the 20/40 rule, intended to discriminate against women, or more specifically, against non-working mothers. Conversely, there is a great deal of authority with regard to Congress' "actual purpose" in enacting the rule.

There are two primary legitimate objectives behind the 20/40 rule. Congress' first objective was to create a self-supporting program. *See Tuttle v. Sec'y of Health, Education & Welfare,* 504 F.2d 61, 62-63 (10th Cir. 1974) (*citing* S. Rep. No. 1987, 83rd Cong. 2d Sess., 3 U.S. Code Cong. News, 1954, at 3733; H. Rep. No. 92-231, 92d Cong. 2d Sess., 3 U.S. Code Cong. & Admin. News, 1972, at 5111). Courts have recognized that "maintaining the self-supporting nature of [an] insurance program" is a legitimate governmental interest. *Id* at 63 (quoting *Geduldig v. Aiello,* 417 U.S. 484, 496, 94 S. Ct. 2485, 41 L.Ed.2d 256 (1974)); *See also Lerner v. Richardson,* 393 F.Supp. 1387, 1391 (E.D. Pa. 1975) (holding that "where the funds available under a social welfare program are finite, it is reasonable for Congress to build into the system a safeguard against disproportionately high payments to those who have made the smallest contributions"), the 20/40 rule is rationally related to and promotes this objective by ensuring that persons make some substantial contribution to the social security system prior to the onset of disability. *Tuttle,* 504 F.2d at 63.

Second, Congress intended to provide disability benefits to those who were dependent on their employment income. *Id.* (*citing* S. Rep. No. 2388, 85th Cong. 2d Sess., 3 U.S Code Cong. & Admin. News 1958, at 4229 ("it is reasonable and desirable that there be reliable means of limiting such protection to those persons who have had sufficiently long and sufficiently recent covered employment to indicate that they probably have been dependent upon their earnings"); S. Rep. No. 1987, 83rd Cong. 2d Sess, 3 U.S. Code Cong. News 1954, at 3729). The Social Security program was designed to "afford protection to working members of the nation's economy," and as such, is based in part on Congress' determination "that those who in their productive years were functioning members of the economy may justly call upon that economy, in their later years, for protection from the 'rigors of the poor house.'" *Lerner*, 393 F. Supp. at 1391 (quoting *Helvering v. Davis*, 301 U.S. 619, 641, 57 S. Ct. 904, 909, 81 L. Ed. 1307 (1937)). Again, the 20/40 rule is rationally related to and promotes this objective by "screen[ing] out those who have not established a substantial attachment to the labor force because they do not have a reasonably long, as well as recent, record of covered earnings." *Tuttle*, 504 F.2d at 63.

Plaintiff argues that the goal of self-sufficiency is an "insufficient justification for discrimination," asserting that there is no evidence that the Social Security program has at any time been self-sufficient, nor that elimination of the 20/40 rule would be an impediment to that goal. (Pl's Objs. to Recomm. Ruling 5.) Moreover, Plaintiff argues that even if this Court were to accept self-sufficiency as a legitimate

goal of the Social Security program, it does not justify the denial of Medicare benefits, which Plaintiff seeks and needs (*Id.*) This argument, however, is not persuasive. As set forth above, Congress had multiple reasons for enacting the 20/40 rule, both of which have been held to be legitimate and both of which are rationally related to the rule. *See, e.g., Geduldig v. Aiello,* 417 U.S. at 496 (holding, in the context of a state disability insurance program, that "[t]he State has a legitimate interest in maintaining the self-supporting nature of its insurance program," and "in distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, rather than to cover all disabilities inadequately"). Even if the goal of self-sufficiency were rejected, it remains the case that one legitimate purpose behind the enactment of the 20/40 rule was Congress' desire to preserve disability benefits for those persons who are currently dependent on their employment income.

Numerous courts have upheld the 20/40 rule as constitutional under both the Equal Protection and Due Process Clauses of the Fifth Amendment *See, e.g., Harvell v. Chater,* 87 F.3d 371 (9th Cir. 1996) (per curiam); *Tuttle,* 504 F.2d 61; *Winger v. Barnhart,* 320 F. Supp. 2d 741 (C.D. Ill. 2004); *Hesse v. Harris,* No. 78 C 5176, 1980 U.S. Dist. LEXIS 10122, at *34 (N.D. Ill. Jan. 31, 1980) For the reasons discussed above, this Court also finds that the 20/40 rule is rationally related to the legitimate goals of the Social Security program. Because the rule is not a "patently arbitrary classification, utterly lacking in rational justification," *Harvell,* 87 F.3d at 375, it is not unconstitutional. Although Plaintiff's situation is a

tragic one, any alterations to the 20/40 rule that would rectify the problem must be initiated by the legislative, and not the judicial, branch of government.

2. *Fifth Amendment Due Process Claim*

Plaintiff also contends that the 20/40 rule, as applied here, violates her substantive due process rights under the Fifth Amendment. (Pl.'s Mem. Supp. Mot. Summ. J. 10-16; Pl's Mem. Opp. Def.'s Mot. Affirm 8-9.) Defendant responds that Plaintiff has not shown a due process violation as she was afforded an opportunity to present her claim for disability benefits at an administrative hearing, and the amendments to the Social Security Act do not affect the 20/40 requirement (Def.'s Mot. Affirm 10).[10]

Under either the Equal Protection Clause, *see Richardson v. Belcher*, 404 U.S. 78, 81, 30 L. Ed. 2d 231, 92 S. Ct. 254, or the Due Process Clause, *Hemming v. Nestor*, 363 U.S. 603, 611, 4 L. Ed. 2d 1435, 80 S. Ct. 1367, a statutory classification in a social welfare program is constitutional if it is rationally based and free from invidious discrimination. *Tuttle*, 504 F.2d at 62; *see also Harvell v. Chafer*, 87 F.3d 371, 373 (9th Cir. 1996).

The Due Process Clause of the Fifth Amendment requires that the government not deprive any citizen

10. Because Plaintiff is arguing that her substantive, rather than procedural due process rights were violated, it is unnecessary to consider whether she obtained a "full and fair" hearing under the standard enunciated in *Yancey v. Apfel*, 145 F.3d 106, 111 (2d Cir. 1998).

of "life, liberty, or property, without due process of law." U.S. CONST. amend. V. As an initial matter, Plaintiff has no property right to her Social Security taxes. The Supreme Court has rejected the notion that social security payments create an "investment," holding that "the noncontractual interest of an employee covered by the [Social Security] Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments " *Flemming*, 363 U.S. at 610. Because there is no property right, but only a noncontractual interest at issue, "the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Id.* at 611.

Plaintiff argues that a rule which disregards her fifteen years of full employment cannot be rationally based. Although Plaintiff's correct that this does evidence a significant contribution to the Social Security program, Congress, in enacting the 20/40 rule and the Social Security Act in general, had numerous goals, only one of which was to "afford more protection to the family as a unit." *Weinberger v. Wiesenfeld*, 420 U.S. at 643-44.[11] Congress also sought, with the enactment of the 20/40 rule, to make the system self-supporting, *See* S. Rep. No. 1987, 83rd Cong. 2d Sess., 3 U.S. Code Cong. News, 1954, at 3733;

---

11. The *Wiesenfeld* Court also noted that "[u]nderlying the 1939 [amendments] was the principle that under a social-insurance plan the primary purpose is to pay benefits in accordance with the probable needs of the beneficiaries rather than to make payments to the estate of a deceased person." 420 U.S. at 644 (internal quotations & citation omitted).

H. Rep. No. 92-231, 92d Cong. 2d Sess., 3 U.S. Code Cong. & Admin. News, 1972, at 5111, and to ensure that disability benefits were preserved for those who are currently dependent on their employment income, *see* S. Rep. No. 2388, 85th Cong, 2d Sess. , 3 U.S. Code Cong & Admin. News 1958, at 4229; S. Rep. No. 1987, 83rd Cong. 2d Sess., 3 U.S. Code Cong. News 1954, at 3729. The 20/40 rule is rationally related to these legitimate goals.

Congress, in an effort to favor victims of ALS, recently amended the Social Security Act to allow individuals who have filed an application, are under a disability by virtue of being diagnosed with ALS, and are currently insured for disability benefits to waive the twenty-four-month waiting period for Medicare coverage. *See* H.R. Rep. No, 106-1019, § 104 (2000); *see also* 42 U.S.C. § 426(h); 42 U.S.C. § 426(b)(2)(A); 42 U.S.C. § 423(a), In 2003, the SSA amended its regulations to permit findings of presumptive disability with respect to claims involving ALS. *See* Revised Medical Criteria for Evaluating Amyotrophic Lateral Sclerosis, 68 Fed. Reg. 51689, 51691-92 (Aug. 28, 2003) (to be codified at 20 C. F. R. pts. 404 and 416) Although Congress thus intended to aid individuals with ALS, the amendments did not alter the 20/40 requirement and did not change Plaintiff's status as not currently insured. Plaintiff is not entitled to collect disability benefits under the statute as Congress has drawn the criteria for eligibility in a manner which does not embrace Plaintiff, no matter how sad her circumstances.

Although the 20/40 rule may not perfectly comport with all of the goals behind the Social Security Act, it does not contain an inherently invidious classification and does not impinge on fundamental rights. The "rough accommodation" reached by the 20/40 rule may appear "illogical," however, it cannot be said that it is so arbitrary as to violate the Due Process Clause, and accordingly, it is not the province of this Court to strike it down. *See Dandridge*, 397 U.S. at 485; *Brown*, 905 F.2d at 635.[12] For the reasons set forth in this and the preceding section, this Court finds that the 20/40 rule is not based on a "patently arbitrary classification," is rationally based, and is free from invidious discrimination. *See, e.g., Harwell v. Chater*, 87 F.3d 371, 373 (9th Cir. 1996); *Tuttle v. Sec'y of Health, Education & Welfare*, 504 F.2d 61, 62-63 (10th Cir. 1974). As such, the 20/40 rule does not violate the Due Process Clause of the Fifth Amendment.

III. CONCLUSION

For the reasons set forth above, the Recommended Ruling [Doc. No. 22] denying Plaintiff's Motion for Summary Judgment and granting Defendant's Motion for Order Affirming the Decision of the Commissioner is **approved** and **adopted**. Accordingly, Plaintiff's Motion for Summary

---

12. In *Brown*, the Second Circuit held that "[i]t is the responsibility of Congress, not the courts, to determine how public funds should be spent and how they should be raised." The Second Circuit reasoned that "legislative decisions are constrained by fiscal necessity" and "[e]very desirable program cannot be funded, nor can the full needs of every funded program be met." 905 F.2d at 635.

Appendix B

Judgment [Doc. No. 10] is **denied** and Defendant's Motion for Order Affirming the Decision of the Commissioner [Doc. No. 15] is **granted**. The clerk is directed to close the case.

SO ORDERED.

Dated at New Haven, Connecticut, July 17, 2006.

/s/

Peter C. Dorsey, U.S District Judge
United States District Court

APPENDIX C — RECOMMENDED RULING OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT DATED AND FILED APRIL 25, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

3:05 CV 1677 (PCD)

CLAIRE COLLIER

v.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY

DATE: APRIL 25, 2006

RECOMMENDED RULING ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND ON DEFENDANT'S MOTION FOR ORDER AFFIRMING THE DECISION OF THE COMMISSIONER

This action, filed under § 205(g) of the Social Security Act, 42 U.S.C. § 405(g), as amended, seeks judicial review of a final decision by the Commissioner of Social Security ["Commissioner"], that denied plaintiff Disability Insurance Benefits ["DIB"].

I. ADMINISTRATIVE PROCEEDINGS

On January 27, 2004, plaintiff Claire Collier, filed her application for DIB. (*See* Certified Transcript of Administrative Proceedings, filed December 23, 2005

["Tr."] 24-26). The Commissioner denied the application initially and upon reconsideration. (*See* Tr. 27-36).

On November 4, 2004, plaintiff filed a request for a hearing before an Administrative Law Judge ["ALJ"]. (*See* Tr. 38-44). Such hearing was held before ALJ Robert A. Di Biccaro on March 14, 2005. (*See* Tr. 147-88). Plaintiff was represented by counsel at the hearing. (*See* Tr. 37, 147). On June 10, 2005, ALJ Di Biccaro issued his decision, in which he held that while plaintiff is disabled by Amyotrophic Lateral Sclerosis ["ALS"], plaintiff did not have this impairment prior to December 31, 1999, the fast date she was insured by the Social Security Act, so that plaintiff is not entitled to DIB. (*See* Tr. 19-22). Seven days later, plaintiff submitted the first of three letters to the Social Security Administration ["SSA"] seeking permission to file an expedited appeal to the district court. (*See* Tr. 5-15).[1] Plaintiff's requests for review were denied by the Appeals Council on August 25, 2005, rendering the ALJ's decision, dated June 10, 2005, the final decision of the Commissioner of Social Security. (*See* Tr. 2-4).

Plaintiff commenced this action on October 28, 2005 to challenge the constitutionality of 42 U.S.C. § 423(c)(1), commonly referred to as the "20/40 Rule." (Dkt. #1).[2] On December 23, 2005, defendant filed

---

1. Plaintiff's letters, treated as a Request for Review, are dated June 17, July 22, and August 9, 2005. (*See* Tr. 5-15).

2. Attached to plaintiff's Complaint are the following three exhibits: copy of plaintiff's Social Security and Medicare Earnings Record (Exh. A); copy of ALJ Di Biccaro's June 10, 2005 decision (Exh B.); and copy of Notice of Appeals Council Action, dated August 25, 2005 (Exh. C).

her Answer, with the administrative record attached. (Dkt. #9). Pending before the Court are plaintiff's Motion for Summary Judgment, brief, Local Rule 56(a)1 Statement and affidavits in support, filed January 26, 2006 (Dkts. ##10-14),[3] and defendant's Motion for Order Affirming the Decision of the Commissioner and brief in support, filed February 22, 2006. (Dkts. ##15-16). On March 6, 2006, plaintiff filed her brief and affidavit in opposition to defendant's Motion. (Dkts. ##19-20; *see* Dkt. #17-18).[4] Twenty-three days later, United States District Judge Peter C. Dorsey referred this case to this Magistrate Judge. (Dkt. #21).

For the reasons stated below, plaintiff's Motion for Summary Judgment (Dkt. #10) is *denied* and defendant's Motion for Order Affirming the Decision of the Commission (Dkt. #15) is *granted.*

---

3. Attached to the affidavit of Richard F. Hans, sworn to January 25, 2006 (Dkt. #13) are the following three exhibits: copies of correspondence to the SSA from plaintiff's counsel, dated August 18 & September 30, 2005 (Exhs. 1 & 3); and copy of correspondence from the SSA to plaintiff's counsel, dated September 15, 2005 (Exh. 2).

4. Attached to the affidavit of Richard F. Hans, sworn to March 6, 2006 (Dkt. #20) are the following: copy of tables indicating Allowances and Denials for Anterior Horn Cell Disease at the Initial Adjudicative Level and Reconsideration Adjudicative Level, prepared September 2005 (Exh. A); and copy of DVD recording of the *Today* show, dated May 13, 2005 (Exh. 8).

Appendix C

II. FACTUAL BACKGROUND

Plaintiff is a forty-three year old female who is married with three children. (*See* Tr. 24-25, 142). Plaintiff held summer jobs while she was in college, and after graduation, she was gainfully employed as a special events coordinator, a banquet sales coordinator, a secretary and as an administrative assistant for several employers for the next ten years. (*See* Tr. 49-50, 53, 111, 166-69). Over the course of her fifteen years of employment,[5] plaintiff paid $19,544 to Social Security and $4,668 to Medicare; her employer matched both amounts. (*See* Tr. 53). Plaintiff testified at her hearing before ALJ Di Biccaro that she worked "until [she was] about eight and a half months pregnant" and then stopped for the birth of her first child, Kieran, who was born in September 1994. (*See* Tr. 169-70). Plaintiff thereafter became a stay-at-home mom for Kieran, Bridget, who was born in May 1996, and Leah, who was born fourteen months later. (*See* Tr. 40, 41, 142, 152-53, 169-72). While her daughters were in preschool, in 2000 and 2002, plaintiff was paid for some of the work she performed for their classes. (*See* Tr. 53, 173-75).

In or around March 2003, plaintiff began "feeling twitches in [her] arms" and would "get cramps in [her] calves and the arches of [her] feet." (*See* Tr. 177). Plaintiff was diagnosed with Amyotrophic

5. While plaintiff represents in her brief that she worked 18 calendar years (*see* Dkt. #11, at 10), her Complaint and her earnings record reflect continuous employment from 1979 to August 1994, which is 15 calendar years. (*See* Tr. 49-50 & 53; Dkt. #1, ¶ 4). The difference, however, is irrelevant.

Lateral Sclerosis ["ALS"] by Dr. Dale J. Lange, on October 13, 2003. (*See* Tr. 126, 179). Thereafter, on January 27, 2004, plaintiff filed her application for DIB. (*See* Tr. 24-26). Plaintiff was denied benefits on grounds of insufficient work history. (*See* Tr. 19-22, 27-29).

In his decision, ALJ Di Biccaro observed that "[a]s a threshold matter, . . . [plainitff] concedes that she is insured for disability purposes only through December 1999 and that she had no symptoms of ALS until 2003." (*See* Tr. 20). Plaintiff therefore "is pursuing this appeal on constitutional grounds by challenging the provisions of the Social Security Act and regulations," specifically, 42 U.S.C. § 423(c)(1), and its associated regulations. (*Id.*). Accordingly, in his decision, ALJ Di Biccaro observed that he lacks the "authority to disregard the requirements of the Social Security Act and regulations" so as to find in her favor. *(Id.).*[6]

---

6. As ALJ DiBiccaro poignantly observed:

> Both [plaintiff] and her husband testified in a forthright, credible and heartfelt manner.... [Plaintiff] has fought courageously against the disease and has done everything possible to continue in her role as a wife and mother. Her personal story is compelling, and her ongoing efforts to raise her children despite the disease merit admiration.
>
> . . . [Plaintiff] alleges that the disability quarter of coverage rules discriminate against stay-at-home parents who are more likely than not women. Unfortunately, the undersigned does not have the authority to change or disregard the law regardless of how compelling her story is.

(Tr. 21).

Appendix C

III. STANDARD OF REVIEW

The scope of review of a Social Security disability determination involves two levels of inquiry. The court first must decide whether the Commissioner applied the correct legal principles in making the determination. Next, the court must decide whether the determination is supported by substantial evidence. *See Balsamo v. Chater*, 142 F.3d 75, 79 (2d Cir. 1998). "Substantial evidence" is evidence that a reasonable mind would accept as adequate to support a conclusion; it is more than a "mere scintilla." *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Yancey v. Apfel*, 145 F.3d 106, 111 (2d Cir. 1998). The substantial evidence rule also applies to inferences and conclusions that are drawn from findings of fact. *See Gonzalez v. Apfel*, 23 F. Supp. 2d 179, 189 (D. Conn. 1998); *Rodriquez v. Califano*, 431 F. Supp. 421, 423 (S.D.N.Y. 1977). The court may not decide facts, reweigh evidence or substitute its judgment for that of the Commissioner. *See Dotson v. Shalala*, 1 F.3d 571, 577 (7th Cir. 1993). The court must scrutinize the entire record to determine the reasonableness of the ALJ's findings. Furthermore, "[w]here there is a reasonable basis for doubt whether the ALJ applied correct legal principles, application of the substantial evidence standard to uphold a finding of no disability creates an unacceptable risk that a claimant will be deprived of the right to have her disability determination made according to the correct legal principles." *Schaal v. Apfel*, 134 F.3d 496, 504 (2d Cir. 1998)(citation omitted).

Under the Social Security Act, every individual who is under a disability is entitled to disability

insurance benefits. *See* 42 U.S.C. § 423(a)(1). "Disability" is defined as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A).[7] In 2003, the SSA amended

7. A number of factors are considered and a five-step process is followed when deciding whether a claimant is disabled. First, the court determines whether the claimant is engaged in substantial gainful activity. *See* 20 C.F.R. § 404.1520(a). If the claimant is performing substantial gainful activity, the claim will be disallowed. *See* 20 C.F.R. § 404.1520(b). If the claimant is not working, then the second step requires that a finding be made as to the existence of a severe mental or physical impairment; if none exist, the claim is denied. *See* 20 C.F.R. § 404.1520(c). If the claimant has a severe impairment, the third step is to compare the claimant's impairment with those in the Listing. *See* 20 C.F.R. § 404.1520(d); *Bowen v. Yuckert*, 482 U.S. 137, 141 (1987); *Balsamo*, 142 F.3d at 79-80. If the claimant's impairment meets or equals one of the impairments in the Listing, the claimant is automatically considered disabled. *See* 20 C.F.R. § 404.1520(d); *see also Balsamo*, 142 F.3d at 80. If the claimant's impairment does not meet or equal a listed impairment, then the fourth step is to show that he cannot perform his former work. *See* 20 C.F.R. § 404.1520(e). If the claimant cannot perform his former work, then the fifth step is to show that he is prevented from doing any other work; disability benefits can only be received if a claimant cannot perform any alternate gainful employment. *See Balsamo*, 142 F.3d at 80 (citations omitted).

The initial burden of establishing disability is on the claimant. *See* 42 U.S.C. § 423(d)(5). Once the claimant demonstrates that he is incapable of performing his past work, (Cont'd)

Appendix C

(Cont'd)
however, the burden shifts to the Commissioner to show that the claimant has the residual functional capacity to perform other substantial gainful activity in the national economy. *See Balsamo*, 142 F.3d at 80 (citations omitted). This may require application of the Medical-Vocational Guidelines ["the Grid"]; the Grid classifies employment into five groups based on exertional requirements of the different types of work, *i.e.*, sedentary, light, medium, heavy and very heavy. *See Gray v. Chater*, 903 F. Supp. 293, 297-98 n.5 (N.D.N.Y. 1995). These categories are based on strength requirements of such activities as sitting, walking, standing, lifting, carrying, pushing, and pulling. *See id.* The Grid places claimants with severe exertional impairments who can no longer perform past work into Grid categories according to their residual functional capacity, age, education and work experience, and dictates a conclusion of disabled or not disabled. *See id.*, 903 F. Supp. at 298. When the Commissioner makes a determination as to a claimant's disability, she must explain what physical functions the claimant is capable of performing; in order to sustain her burden of showing that the claimant can perform sedentary work, the [Commissioner] must proffer specific medical evidence that the plaintiff can meet the exertional demands necessary to maintain sedentary work." *Mitchell_ v. Chater*, 918 F. Supp. 675, 682 (W.D.N.Y. 1995)(citations omitted).

In determining whether or not a claimant is disabled, the Commissioner considers: (1) objective medical facts and clinical findings; (2) diagnoses and medical opinions of examining physicians; (3) the claimant's subjective evidence of pain and physical incapacity as testified to by himself and others who observed him; and (4) the claimant's age, educational background, and work history. *See Carroll v. Secretary of HHS*, 705 F.2d 638, 642 (2d Cir. 1983)(multiple citations omitted). In addition, the opinion given by a treating physician is entitled to considerable weight and in the absence of contradictory evidence, is binding on the Commissioner. *See id.* (multiple citations omitted).

its regulations to allow the SSA to make findings of presumptive disability in Listing 11.10 with respect to claims involving ALS. *See* Revised Medical Criteria for Evaluating Amyotrophic Lateral Sclerosis, 68 Fed. Reg. 51689, 51691-92 (Aug. 28, 2003)(to be codified 20 C.F.R. pts. 404 and 416). Thus, a claimant diagnosed with ALS is presumptively disabled. In this case, it is undisputed that plaintiff suffers from ALS, which, as stated above, is a medically determinable impairment. (*See* Tr. 22).

A claimant's work history is a prerequisite to a determination of eligibility for disability benefits. Thus, in order for a claimant to qualify for disability benefits, in addition to proving disability under the statute, a claimant must have "insured status." *See* 20 C.F.R. § 404.130.[8] For plaintiff to have disability insured status, plaintiff must satisfy the 20/40 Rule. *See* 20 C.F.R. § 404.130(b). The 20/40 Rule requires that plaintiff have at least 20 quarters of coverage in a 40 quarter period ending with the quarter that she allegedly became disabled.[9] *See* 20 C.F.R. § 404.130(b)(2). The inquiry in this case, therefore, does not relate to the claim of disability or the capacity of plaintiff to perform work related activity, but rather, the constitutionality of 42 U.S.C. § 423(c)(1)

8. There are four rules outlined in 20 C.F.R. § 404.130, only one of which, Rule I, is applicable to this case.

9. A "quarter" of coverage is the basic unit used by the SSA in determining whether a claimant has sufficient coverage under the Act to achieve insured status. *See* 20 C.F.R. § 404.140(a). An individual earns "quarters" based on the wages the person was paid during the period of three calendar months ending on March 31, June 30, September 30, or December 31 in any year. *See* 42 U.S.C. § 413(a)(1); 20 C.F.R. § 404.101(b).

which application results in a denial of disability benefits to plaintiff who was only insured for benefits through December 31, 1999. (*See* Tr. 19-22). "The phrase 'period of disability' is a legal term, encompassing both a literal disability and fully insured status." 2 SOCIAL SECURITY LAW AND PRACTICE § 13.35, at 34 (1997)(footnote omitted). Although plaintiff urges this Court to do so, "[t]o interpret the regulation as applying to persons who are not fully insured at the beginning of a period of disability would conflict with the underlying statute". *Id.* (footnote omitted); *see* 42 U.S.C. § 416(i).

IV. DISCUSSION

ALJ Di Biccaro found that although plaintiff has ALS, which is a medically determinable impairment, and plaintiff has not engaged in substantial gainful activity since the alleged onset of disability, plaintiff did not have this impairment "prior to December 31, 1999; therefore, [plaintiff] did not have a 'severe' impairment prior to her date last insured (20 C.F.R. § 404.1520)." (See Tr. 21-22). Accordingly, ALJ Di Biccaro concluded that plaintiff "was not under a 'disability' as defined in the Social Security Act, at any time through the date of this decision as it relates to her date last insured of December 31, 1999 (20 C.F.R. § 404.1520(c))." (*Id.*). ALJ Di Biccaro acknowledged, however, that because plaintiff was "pursuing [her] appeal on constitutional grounds by challenging the provisions of the Social Security Act and regulations," ALJ Di Biccaro lacked the "authority to disregard the requirements of the Social Security Act and regulations" so as to find in her favor. (*See* Tr. 20).

Appendix C

Plaintiff seeks summary judgment on grounds that the 20/40 Rule denies plaintiff equal protection under the Fifth Amendment as the denial of benefits in this case discriminates against plaintiff and all other women between the ages of 31 and 41 years who stay at home to care for their children and thus are unable to work at least five of the ten previous years, notwithstanding prior work history. (Dkt. #11, at 7-9). Additionally, plaintiff asserts that the 20/40 Rule, as applied to plaintiff, violates the due process clause of the Fifth Amendment, as such rule "runs contrary to the policies underlying the Social Security and Medicare systems in general and, in particular, as they have been amended to otherwise specifically accommodate victims of ALS." (*Id.* at 10-16).

In her Motion for Order Affirming the Decision, the Commissioner contends that plaintiff has failed to show an equal protection violation as the interests in the government in maintaining the solvency of the Disability Insurance program and in ensuring that disability recipients have been dependent on their wages is legitimate, and the statute bears a rational relationship to that interest. (Dkt. #16, at 4-10). According to the Commissioner, plaintiff has not made a showing of a due process violation as due process, as applied to the federal government, requires that a social security disability hearing be full and fair and plaintiff had an opportunity to present her case. (*Id.* at 10). Moreover, the Commissioner contends that the amendments to the Social Security Act, which change the eligibility requirements for Medicare coverage for victims of ALS, do not affect the 20/40 requirement. (*Id.* at 11).

Appendix C

In her brief in opposition to the Commissioner's Motion, plaintiff reasserts that the 20/40 Rule denies plaintiff equal protection under the Fifth Amendment as women who leave the workforce to raise children are disproportionately excluded from eligibility for Social Security and Medicare benefits, and the 20/40 Rule contradicts Congress's clear intent to provide immediate assistance to ALS victims and their families. (Dkt. #19, at 2-5 & 8-9). Plaintiff further contends that defendant has "failed to proffer a shred of proof that the SSDI program is self-sufficient or that [the] eradication [of the 20/40 Rule] would materially undermine that goal," and the standard of review for a procedural due process challenge is not applicable here; rather, the rational basis standard is appropriate as plaintiff challenges the 20/40 Rule on substantive due process grounds. (Dkt. #19, at 5-8).

A. EQUAL PROTECTION

As stated above, plaintiff contends that the 20/40 Rule denies plaintiff equal protection under the Fifth Amendment as the Rule has a "disparate and discriminatory impact" against plaintiff and other women who "after materially contributing to the Social Security and Medicare Trust Funds, elect to stay home and engage in the mothering of their children." (Dkt. #11, at 7-9; Dkt. #19, at 2-3). The Commissioner responds that plaintiff has failed to show an equal protection violation in that the government interest "embodied in the '20/40' rule is legitimate" and the statute bears a rational relationship to that interest. (Dkt. #16, at 4-5).

Appendix C

The Fifth Amendment of the U.S. Constitution provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law." "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process." *Schneider v. Rusk*, 377 U.S. 163, 168 (1964)(internal quotations & citations omitted); *see also Nicholas v. Tucker*, 114 F.3d 17, 19 (2d Cir. 1997), *cert. denied*, 523 U.S. 1126 (1998). "It is . . . well-established that the constitutional guarantee of equal protection does not forbid all classifications, but rather keeps governmental [decision makers] from treating different persons who are in all relevant respects alike." *Nicholas*, 114 F.3d at 20 (internal quotations & multiple citations omitted). Unless the challenged statute "burden[s] a fundamental right or draw[s] on distinctions based on a suspect classification," a Court must "uphold" the legislation if the statute bears a rational relationship "to a legitimate governmental objective." *Id.* at 20 (citation omitted). Moreover, the Second Circuit has reiterated that the rational basis standard of review applies specifically in cases such as the one at hand, where "[d]istinctions [are] made in [a] social welfare statute[ ]." *Brown v. Bowen*, 905 F.2d 632, 635 (2d Cir. 1990)(multiple citations omitted), *cert. denied*, 498 U.S. 1093 (1991); *see also Rudykoff v. Apfel*, 193 F.3d 579, 580 (2d Cir. 1999)("Constitutional challenges to social welfare legislation such as the Social Security Act are reviewed under the rational basis standard.") (multiple citations omitted). Additionally, the choices made by Congress in enacting the challenged statute "will be upheld unless they are clearly wrong, a display of arbitrary power, [and] not an exercise of

judgment." *Brown*, 905 F.2d at 635 (internal quotations & multiple citations omitted). Thus, "[u]nless a statute employs a classification that is inherently invidious or that impinges on fundamental rights," federal courts should "properly exercise[ ] only a limited review power over Congress." *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981)(citation omitted).

There are two ways in which governmental action can violate the equal protection clause. "The first occurs when the Government explicitly classifies or distinguishes among persons" based on specific criteria, such as, race, sex, religion or ethnicity. *De La Cruz v. Tormey*, 582 F.2d 45, 49 (9th Cir. 1978), *cert. denied*, 441 U.S. 965 (1979).[10] In this case, there is no claim of this type of facial discrimination. The "second and more subtle variety of discrimination focuses, not on the form of the governmental action, as does the first, but rather its results." *Id.* at 50. This type of discrimination is, in form nondiscriminatory, but produces "effects which weigh adversely and disproportionately upon the members of a particular group of individuals." *Id.* This

---

10. In *De La Cruz*, the plaintiffs were all young women who challenged the lack of campus child care facilities in the San Mateo Community College District, asserting a violation of the Equal Protection Clause of the Fourteenth Amendment on grounds that defendants' actions constituted intentional, invidious, gender-based discrimination and were arbitrary and unrelated to the legitimate goal of providing education. 582 F.2d at 48-49. The Ninth Circuit denied defendants' motion to dismiss as to the Equal Protection challenge on grounds that "[i]t [was] too early in the course of this litigation . . . to determine whether the defendants' conduct was free from discriminatory purpose [and] what level of 'scrutiny' is applicable on the novel facts of this case." 582 F.2d at 59.

type of discrimination "may require explanation in terms of non-invidious purposes." *Id.*

According to plaintiff, "[s]tudies have shown that 60 women with professional degrees are out of the labor force at a rate about three times that of their male counterparts and they overwhelming cite family responsibilities as the reason.'" (Dkt. #11, at 7-8, *quoting* Jerry A. Jacobs & Janice Fanning Madden, *Mammies & Daddies on the Fast Track: Success of Parents in Demanding Professions*, 596 Annals Of Am. Acad. Of Pol. & Soc. Sci. 246, 250 (2004)); *see also* Samuel Issacharoff & Elyse Rosenblum, *Women & the Workplace: Accommodating the Demands of Pregnancy*, 94 Colum. L. Rev. 2154, 2160-65 (1994)["Issacharoff & Rosenblum"].[11] Plaintiff correctly observes that the rates of Disability Insurance coverage for women in their 30's and early 40's are nearly 20% lower than that for men of comparable age; married women are 10% less likely to be insured than single women; and the SSA's records reflect that women between the ages 31 and

11. Plaintiff posits the following example in support of her argument that the 20/40 Rule employs a classification that is inherently invidious — an applicant 31 years old who worked from ages 21 through 26 years and paid into Social Security and Medicare for five years would be entitled to SSDI and Medicare benefits under the 20/40 Rule, whereas an applicant 41 years old, such as the plaintiff when she was diagnosed with ALS, having worked from age 18 through 34, would not be eligible for SSDI or Medicare. According to plaintiff, the recency requirements imposed by the 20/40 Rule, therefore, become more onerous with age, ironically making it more — not less — difficult to receive Medicare or SSDI benefits the closer one is to the respective qualifying ages of 62 or 65 years. (Dkt. #11, at 8).

41 are far more likely to be rejected by SSA than any other group or age bracket. (Dkt. #11, at 8-9; Dkt. #19, at 2-4, *citing* Olivia S. Mitchell & John W.R. Phillips, *Eligibility for Social Security Disability Insurance*, Issues in Brief - U. Mich. Retirement Research Ctr. (2001)["Mitchell & Phillips"]). The sum result is that "working women are less well-protected by Social Security disability insurance than are working men due to their more episodic labor market attachment." *See* Mitchell & Phillips, at 4.

Plaintiff contends that this "imbalance and disproportionality"[12] that the 20/40 Rule imposes upon mothers equates to invidious discrimination. (Dkt. #19, at 3-4)(citations omitted). The allegation of a sexually disproportionate impact, standing alone, however, is insufficient to state a violation of the Constitution. *See De La Cruz*, 582 F.2d at 58. Moreover, "[a] classification does not offend the Constitution because in practice it results in some inequality." *Tuttle v. Secretary of Health, Educ. and Welfare*, 504 F.2d 61, 63 (10th Cir. 1974)(internal quotations & multiple citations omitted). While the "impact of the official action . . . may provide an important starting point" for determining the existence of invidious discrimination, plaintiff must

12. Plaintiff relies on the following language of the Ninth Circuit in *De La Cruz:* "[O]ne may point to the fact that the effects of the challenged 'policy' do not fall exclusively upon women, . . . but affect as well men with child-rearing responsibilities. . . . Challenges which rely upon disparate impact inevitably will involve consequences which are not restricted in their operation to one group or another. The essence of this sort of legal attack is imbalance and disproportionality." 582 F.2d at 57.

also allege that defendant's course of conduct is susceptible to an inference of intentional discrimination. *See De La Cruz*, 582 F.2d at 59 (citation omitted). To determine "whether invidious discriminatory purpose was a motivating factor" demands an inquiry into several evidentiary sources, "including the existence of a 'clear pattern' unexplainable on grounds other than discrimination, the historical background of a decision, the 'specific sequence of events' leading up to the challenged action, and 'departures' from the normal procedural sequences and substantive policies." *Id.* at 58-59 (citations omitted).

While plaintiff is correct that "[h]aving children makes it more likely that women will leave the workforce altogether or switch to part-time employment," Issacharoff & Rosenblum, 94 Colum. L. Rev. at 2165 (footnote omitted), so as to reduce or eliminate the number of quarters of coverage a woman accumulates, plaintiff does not point to any evidence giving rise to an inference of intentional discrimination. *See De La Cruz*, 582 F.2d at 58-59. Moreover, as further discussed below, there is no evidence that an "invidious discriminatory purpose was a motivating factor" in the enactment of the 20/40 Rule; there exists no "'clear pattern' unexplainable on grounds other than discrimination"; the legislative history, as discussed below, evidences a rational relationship of the 20/40 Rule to a legitimate governmental objective, and plaintiff points to no departures from the normal procedural sequences and substantive policies applicable to this social welfare legislation. *See Nicholas*, 114 F.3d at 20; *De La Cruz*, 582 F.2d at 59-60.

Appendix C

In addition to the foregoing, when social welfare legislation is challenged, the legislation is "entitled to a strong presumption of constitutionality." *Califano v. Torres*, 435 U.S. 1, 5 (1978)(citation omitted)(per*curiam)*. "Where rational basis scrutiny applies, the Government has no obligation to produce evidence or empirical data to sustain the rationality of a statutory classification, and instead can base its statutes on rational speculation." *Lewis v. Thompson*, 252 F.3d 567, 582 (2d Cir. 2001)(internal quotations & multiple citations omitted). That notwithstanding, the Commissioner asserts that the 20/40 Rule promotes the legitimate interests of ensuring that the Disability Insurance program is self-supporting and ties disability insurance benefits to employment income. (Dkt. #16, at 5-6).[13]

---

13. Plaintiff contends that the Commissioner should "not hide behind the skirts of a long ago discredited myth of self-sufficiency." (Dkt. #19, at 6). Plaintiff posits that an assertion that the Social Security system is self-supporting "strains credibility" as the Director of the Congressional Budget Office has predicted that "under current law . . . the Social Security trust funds would become exhausted in 2052; after that, the [SSA] would lack the authority to pay full benefits and, without congressional action, outlays would be limited to annual revenues, which would be 22 percent lower than scheduled costs." (Dkt. #19, at 5-6, *quotinq* Statement of Douglas Holtz-Eakin, Director of Congressional Budget Office, "The Future of Social Security before the Special Committee on Aging, United States Senate," at 2-7 (February 3, 2005)). Moreover, plaintiff argues that defendant has failed to "proffer a shred of proof that the SSDI program is self-sufficient, she has not proffered any evidence that the 20/40 Rule in fact supports a goal of self-sufficiency or that its eradication would materially undermine the goal." (Dkt. #19, at 6).

(Cont'd)

Appendix C

It has been Congress's position that the disability insurance system "should be completely self-supporting from the contributions of covered individuals and employers" for "as nearly as can be foreseen and thus is actuarially sound." H.R. Rep. No. 92-231 (1971), *reprinted in* 1972 U.S.C.C.A.N. 4989, 5111. As Congress long ago recognized:

> Under a program which provides protection against loss of earnings on account of disability, it is reasonable and desirable that there be reliable means of limiting such protection to those persons who have had sufficiently long and sufficiently recent covered employment to indicate that they probably have been dependent upon their earnings. It was to meet this purpose that the disability work requirements were designed, and, in most cases, the present work requirements produce results in accordance with this purpose.

(Cont'd)

On the contrary, the Commissioner has proffered evidence that the 20/40 Rule supports the goal of self-sufficiency and that notwithstanding, the statute had a "rational basis when enacted" regardless of the current projections of the funding of social security. *See Brown*, 905 F.2d at 637. Moreover, Congress determines the entitlement to benefits and "[i]t is the responsibility of Congress, not the courts, to determine how public funds should be spent and how they should be raised," and accordingly, to determine how the goal of self-sufficiency shall continue to be met with the present day funding challenges that face the social security programs. *Id.* at 635.

S. Rep. No. 2388 (1958), *reprinted in* 1958 U.S. C.C.A.N. 4218, 4229-30.[14] Moreover, "[t]he Supreme Court has recognized that a State has a legitimate interest in maintaining the self-supporting nature of its insurance program" and this "stated principle also applies to the federal government." *Tuttle*, 504 F.2d at 63 (internal quotations & citation omitted).

Additionally, the 20/40 Rule has been upheld as constitutional under both the Equal Protection and Due Process Clauses of the Fifth Amendment. *See Harvell v. Chater*, 87 F.3d 371 (9th Cir. 1996)(*per curiam*); *Tuttle*, 504 F.2d 61. In *Tuttle*, the Tenth Circuit rejected the constitutional challenge to the 20/40 Rule, brought by a plaintiff who became disabled when he had social security credits for only 19 calendar quarters of work, on grounds that 20/40 Rule, which allows for the entitlement of benefits as determined by Congress, has a rational basis and is free from invidious discrimination. *Tuttle*, 504 F.2d

---

14. To address the inevitable inequity that arises under the 20/40 Rule, namely, the existence of a disability severe enough to cause a person to stop working, yet not severe enough to meet the definition of disability, the legislative history of this statute reads:

> The requirement of 20 quarters of coverage out of the 40 calendar quarters ending with the quarter of disablement, together with the fully insured status requirement, should provide reasonable and adequate assurance that the protection afforded by the disability provisions will be keyed to loss of earnings on account of disability.

S. Rep. No. *2388* (1958), *reprinted in* 1958 U.S.C.C.A.N. 4218, 4230.

at 62-63. Likewise, the Ninth Circuit rejected the constitutional challenge of the plaintiff in *Harvell* who was "fully insured" within the meaning of the Social Security Act, but because he worked in non-covered employment and paid no social security taxes, he earned no quarters of coverage. *Harvell*, 87 F.3d at 373. Following the Tenth Circuit's decision in *Tuttle*, the Ninth Circuit concluded that the 20/40 Rule is not a "patently arbitrary classification, utterly lacking in rational justification." *Harvell*, 87 F.3d at 373 (citation omitted).

Moreover, as another district court held two years ago, the 20/40 Rule does not violate equal protection under the Fifth Amendment because it distinguishes between homemakers and those employed outside the home. Specifically, U.S. Magistrate Judge Evans of the District Court for the Central District of Illinois found:

> this supposed discrimination is not sex-based — 42 U.S.C. § 414 applies equally to both men and women who . . . were employed outside the home intermittently. [Plaintiffs] present no evidence that homemakers are a suspect class entitled to either strict scrutiny or heightened scrutiny. . . . The Supreme Court has held that a classification must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. In addition, under rational basis scrutiny, the means need only be rationally related to a conceivable and legitimate end.

Appendix C

> [T]here is a rational basis for the means employed (the quarters of coverage system), to achieve the intended purpose (determining applicants' eligibility for Social Security benefits, while allowing the program to be self-supporting, and assuring that those receiving benefits were primarily dependent on their lost wages). Therefore, [plaintiffs] cannot show that 42 U.S.C. § 414 violates the equal protection principles inherent in the Due Process Clause.

See Winger v. Barnhart, 320 F. Supp. 2d 741, 747 (D. Ill. 2004)(internal quotations, citations & footnote omitted).

Accordingly, although this Court is deeply sympathetic to plaintiff's tragic plight,[15] Congress's legitimate goals, in enacting the 20/40 Rule, of making the social security system self-sufficient by tying substantial contributions to the system before the onset of disability to an established attachment to the labor force so that disability claimants may demonstrate a dependence on their employment income, cannot be said to be patently arbitrary or lacking rational justification. Any revisions to the 20/40 Rule, to rectify the predicament of plaintiff's situation, ought to be initiated by the legislative, and not judicial, branch of government.

---

15. *See* note 6 *supra*.

Appendix C

B. DUE PROCESS CLAUSE

Plaintiff further argues that denying her SSDI benefits after she has paid social security taxes during the 15 calendar years[16] in which she was employed, is patently unjust and cruel, and runs contrary to the polices underlying the Social Security and Medicare systems in general, and, in particular, as they have been amended to otherwise specifically accommodate victims of ALS. (Dkt. #11, at 10-16; Dkt. #19, at 8-9). The Commissioner responds that plaintiff has not made a showing of a due process violation as she was afforded an opportunity to present her claim for disability benefits at an administrative hearing, and the amendments to the Social Security Act do not affect the 20/40 requirement. (Dkt. #16, at 10).

Plaintiff correctly refers to *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643-44 (1975), which observed that Congress's intent in enacting and amending the Social Security Act was to "afford more adequate protection to the family as a unit" and that "[u]nderlying the 1939 [amendments] was the principle that under a social-insurance plan the primary purpose is to pay benefits in accordance with the probable needs of the beneficiaries[, like plaintiff in this case,] rather than to make payment to [his or her] estate." (internal quotations & citation omitted). However, in addition to furthering the goal of protecting the family as a unit, Congress enacted the 20/40 Rule with the legitimate goals of making the social security system self-supporting by assuring

16. *See* note 5 *supra*.

that disability claimants make a substantial contribution to the system before the onset of disability and of screening out claimants who have not established an attachment to the labor force for a sufficient amount of time to demonstrate that they have depended on their employment income. *See* 2 SOCIAL SECURITY LAW AND PRACTICE § 14.27, at 37-38 (citations omitted).[17]

"It is the responsibility of Congress, not the courts, to determine how public funds should be spent" and to legislate within the lines they must draw to ensure the economic viability of the social welfare programs. *Brown*, 905 F.2d at 635 (internal citations omitted). In that vein, and in light of the goals articulated above, Congress has exercised its judgment so as to favor victims of ALS, in amending the Social Security Act to allow for a waiver of the 24-month waiting period for Medicare coverage for individuals who have filed an application, who are under a disability, and unlike plaintiff, who are insured for disability benefits. *See* H.R. Rep. No. 106-1019(I) (2000); *see also* 42 U.S.C. § 426(h); 42 U.S.C. § 426(b)(2)(A); 42 U.S.C. § 423(a). Moreover, in 2003, the SSA amended its regulations to allow the SSA to make findings of presumptive disability with respect to claims involving ALS. *See* Revised Medical Criteria for Evaluating Amyotrophic Lateral Sclerosis, 68 Fed. Reg. 51689, 51691-92 (Aug. 28, 2003)(to be codified 20 C.F.R. pts. 404 and 416). The foregoing notwithstanding, the Commissioner correctly observes that the amendments to the Social Security Act and to the regulations do not affect the 20/40

17. *See* note 14 *supra*.

requirement. "[T]his Court properly exercises only a limited review power over Congress" as the 20/40 Rule does not include "a classification that is inherently invidious or that impinges on fundamental rights." *Schweiker*, 450 U.S. at 230 (citation omitted). Accordingly, this Court is bound to uphold the choices made by the legislature as they are not "clearly wrong [or] a display of arbitrary power." *Brown*, 905 F.2d at 635 (citations omitted).

In addition to the foregoing, "[w]hether a Social Security Act classification is attacked on equal protection grounds . . . or on due process grounds, . . . the test [that this Court must apply] is whether the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Tuttle*, 504 F.2d at 62 (internal quotations & citations omitted). "Although Congress has great latitude to make classifications in the area of economic and welfare legislation," the federal government must have "some rational basis or be pertinent to some proper objective of Congress" in enacting such legislation in order to withstand a due process challenge. *See Davis v. Richardson*, 342 F. Supp. 588, 591 (D. Conn.), *aff'd mem.*, 409 U.S. 1069 (1972).[18] To satisfy this standard, plaintiff must carry her "heavy burden of

18. Plaintiff correctly observes that the rational basis standard, as stated above, applies to plaintiff's constitutional challenge and that defendant's assertion that due process is satisfied because plaintiff received a "full and fair hearing" is misplaced. *See Yancey*, 145 F.3d at 112 (when a challenge is made on procedure due process grounds, due process "requires that a social security hearing must be full and fair.")(citation omitted).

proof of the system's arbitrary or irrational nature." *Winqer*, 320 F. Supp. 2d at 746.

In contrast to the goals outlined by the Commissioner which have been recognized as rationally related to the legislative purpose underlying the Social Security system, *see Harvell*, 87 F.3d 371; *Tuttle*, 504 F.2d 61, plaintiff has failed to demonstrate how the quarters of coverage system is incapable of achieving those goals. *See Winger*, 320 F. Supp. 2d at 745-46. Thus, for the reasons stated in Section IV.A. *supra*, plaintiff's constitutional challenge on due process grounds cannot survive.

V. CONCLUSION

For the reasons stated above, plaintiff's Motion for Summary Judgment (Dkt. #10) is *denied* and defendant's Motion for Order Affirming the Decision of the Commissioner (Dkt. #15) is *granted*.[19]

The parties are free to seek the district judge's review of this recommended ruling. *See* 28 U.S.C. § 636(b)(**written objection to ruling must be filed within ten days after service of same**); FED. R. CIV. P. 6(a), 6(e) & 72; Rule 72.2 of the Local Rules for United States Magistrate Judges, United States District Court for the District of Connecticut; *Small*

19. The Magistrate Judge commends Attorneys Richard F. Hans, John Vukelj, and John P. Regan and Assistant United States Attorney Ann M. Nevins for their comprehensive and well written briefs on this novel legal question, and further commends plaintiff Claire Collier and her husband William for their courage, devotion, and selfless efforts. This is a significant issue which Congress should address as promptly as possible.

v. Secretary of HHS, 892 F.2d 15, 16 (2d Cir. 1989)(**failure to file timely objection to Magistrate Judge's recommended ruling may preclude further appeal to the Second Circuit**).

Dated this 25th day of April, 2006, at New Haven, Connecticut.

s/ Joan Glazer Margolis
United States Magistrate Judge